(14)

No. 99-1977-CFX Title: Donald Saucier, Petitioner
v.
Elliot M. Katz and In Defense of Animals

Docketed: June 8, 2000 Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Mar 29 2000	Application (99A804) to extend the time to file a petition for a writ of certiorari from April 9, 2000 to May 9, 2000, submitted to Justice O'Connor.
	Mar 29 2000	Application for extension of time to file petition and order granting same until May 9, 2000 (O'Connor, March 30, 2000).
	Mar 30 2000	Application (99A804) granted by Justice O'Connor extending the time to file until May 9, 2000.
	Apr 28 2000	Application (99A804) to extend further the time to file a petition for a writ of certiorari from May 9, 2000 to June 8, 2000, submitted to Justice O'Connor.
	Apr 28 2000	Application for further extension of time to file petition and order granting same until June 8, 2000 (O'Connor, May 1, 2000).
	May 1 2000	Application (99A804) granted by Justice O'Connor extending the time to file until June 8, 2000.
	Jun 8 2000	Petition for writ of certiorari filed. (Response due July 8, 2000)
	Jun 12 2000	Ten copies of videotape lodged.
	Jul 19 2000	DISTRIBUTED for Conference of September 25, 2000
	Aug 23 2000	Response requested.
	Oct 17 2000	Brief of respondents Elliot Katz and In Defense of Animals in opposition filed.
	Oct 25 2000	REDISTRIBUTED for Conference of November 9, 2000
	Oct 27 2000	Reply brief of petitioner Donald Saucier filed.
	Nov 13 2000	Petition GRANTED. SET FOR ARGUMENT March 20, 2001. **********
	Dec 20 2000	Order extending time to file petitioner's brief on the merits to and including January 8, 2001. Order extending time to file respondents' brief on the merits to and including February 16, 2001. A reply brief, if any, must be filed on or before March 12, 2001.
	Dec 27 2000	Motion of Criminal Justice Legal Foundation for leave to file a brief as amicus curiae filed.
	Jan 8 2001	Brief amici curiae of National Association of Police Organizations, et al. filed.
	Jan 8 2001	Joint appendix filed.
	Jan 8 2001	Brief of petitioner Donald Saucier filed.
	Jan 8 2001	Brief amicus curiae of Grand Lodge of Fraternal Order of Police filed.
	Jan 8 2001	Brief amici curiae of Texas, et al. filed.
	Jan 22 2001	Motion of Criminal Justice Legal Foundation for leave to file a brief as amicus curiae GRANTED.
	Jan 29 2001	Record filed.
	Jan 30 2001	CIRCULATED.

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No. 99-1977-CFX

Entry	Date	Proceedings and Orders
	Feb 5 2001	Record filed.
	Feb 15 2001	Brief amicus curiae of Association of the Bar of the City of New York filed.
	Feb 16 2001	Brief of respondents Elliot Katz and In Defense of Animals filed.
	Feb 16 2001	Brief amici curiae of American Civil Liberties Union, et al. filed.
	Mar 12 2001	Reply brief of petitioner Donald Saucier filed.
	Mar 20 2001	ARGUED.
	Mar 21 2001	Letter and attachment received from the Solicitor General and distributed.

FILED
JUN 8 2000
CLERK

No. 99-1977

In the Supreme Court of the United States

DONALD SAUCIER, PETITIONER

v.

ELLIOT M. KATZ AND IN DEFENSE OF ANIMALS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in a case alleging the use of constitutionally excessive force, the test for qualified immunity and the reasonableness test under the Fourth Amendment are identical, such that a finding of unreasonable force under the Fourth Amendment necessarily precludes the officer from being entitled to qualified immunity.

2. Whether the court of appeals erred in concluding, based on the facts known to it "at this stage of the case," that petitioner's use of force in arresting respondent, which consisted of carrying respondent from the crowd to a waiting van and pushing him inside, without injuring him or placing him in any pain, so clearly exceeded the amount of force permitted by the Fourth Amendment as to warrant denial of qualified immunity.

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In the Supreme Court of the United States

No.

DONALD SAUCIER, PETITIONER

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ELLIOT M. KATZ AND IN DEFENSE OF ANIMALS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of Donald Saucier, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-16a) is reported at 194 F.3d 962. The opinions of the district court (App., *infra*, 17a-64a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 22, 1999. A petition for rehearing was denied on January 10, 2000 (App., *infra*, 65a-66a). On March 30, 2000, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to May 9, 2000, and on May 1, 2000, Justice O'Connor again extended the time for filing a petition for a writ of certiorari, this time to and including June 8, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.

STATEMENT

1. Respondent Elliot Katz,[1] an animal rights activist, brought this Fourth Amendment excessive force claim following his arrest at the Presidio military post in San Francisco. The relevant facts are, for the most part, not disputed.[2] On September 24, 1994, Vice President Gore and other speakers gave a special presentation at the Presidio to celebrate the conversion of that facility, which was then an Army base, into a national park the following week. App., *infra*, 3a. The public was invited to attend. *Ibid.*

On the morning of the presentation, respondent arrived at the Presidio early, intending to display a banner protesting possible use of the Letterman Hospital in the Presidio for experimentation involving animals. App., *infra*, 3a, 18a. Perhaps aware that the Army prohibits the display of political banners on military bases like the Presidio,[3] respondent kept his

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[1] The suit was also brought by respondent In Defense of Animals, an organization of which Katz is president. We use the word "respondent" to refer to respondent Katz alone, except where context indicates otherwise.

[2] Because the case arises on petitioner's motion for summary judgment, we present any disputed facts in the light most favorable to respondent.

[3] See *Greer* v. *Spock*, 424 U.S. 828 (1976); *United States* v. *Albertini*, 472 U.S. 675, 684-686 (1985). Although the Army handed

banner concealed under his jacket as he entered the base and walked to the seating area near the speaking platform. Resp. Dep. 32. Respondent sat down in the front row; at some point, he removed the banner from under his jacket and held it closed on his lap. *Id.* at 32, 35-36; App., *infra*, 4a.

During Vice President Gore's speech, respondent walked from his front-row seat to the waist-high barrier that separated the spectators from the Vice President and began to unfurl his roughly 4-foot-by-3-foot banner. App., *infra*, 4a, 19a, 22a. The banner read: "Please Keep Animal Torture Out of Our National Parks." *Id.* at 4a, 19a. As Katz unfurled the banner and attempted to place it on the barrier, someone "grabbed [him] from behind, and somebody else tore the banner away." *Id.* at 4a, 24a. The two individuals were petitioner Donald Saucier and Sergeant Steven Parker, who were serving as military police. *Id.* at 4a. Petitioner and Parker each took one of respondent's arms and quickly removed him from the seating area. According to respondent, they "started sort of picking me up and kind of walking me out, kind of like very hurriedly." *Id.* at 4a, 25a.

Respondent claims that he was then "shoved" into a military police van located behind the seating area. App., *infra*, 4a, 25a. According to respondent, he nearly fell headlong into the van and was almost injured. *Ibid.* But respondent did not fall headlong into the van. Nor was he injured. To the contrary, respondent caught himself and avoided injury. *Ibid.* After being driven to

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out fliers to potential protestors to advise them of the prohibition, Lee Dep. 24, 30, respondent claims that he never received written notice. Respondent, however, knew that other visitors to the base had been asked to leave when they attempted to circulate handbills and engage in other political activities. Resp. Dep. 67-68.

a military police station, respondent was briefly detained. He was then released, and he drove himself home. *Id.* at 4a-5a.

The events at the Presidio were covered by the news media. As a result, much of respondent's arrest was broadcast on the local news. A videotape of the relevant portions of the broadcasts, which is part of the record in this case, is being lodged with the Court.

2. Respondent brought this action against petitioner and other officials pursuant to *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), alleging that his arrest violated his First and Fourth Amendment rights. Respondent's First Amendment claim and his claim that he was unlawfully arrested without probable cause were rejected by the district court on qualified immunity grounds, and are no longer at issue.[4] This petition concerns his claim

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[4] With respect to the First Amendment claims, the district court concluded that, given "the transitional state of the Presidio on September 24, 1994"—the Presidio was still an Army post—it was not clear whether the Presidio could be considered a public forum. App., *infra*, 5a, 44a. As a result, the court explained, "the rights of protestors at the Presidio were not well established on the date in question, [and] a reasonable military officer could have concluded that preventing protests at the base was Constitutional." *Ibid.* For the same reason, the district court concluded that summary judgment was appropriate with respect to the claim of unlawful arrest. The court explained that, because a reasonable officer could have believed that prohibiting protests on the base was constitutional, a reasonable officer also could have believed that respondent was about to commit a crime when he approached the speaking area and attempted to unfurl a protest banner. *Id.* at 5a, 23a. Finally, the district court concluded that respondent lacked standing to seek declaratory and injunctive relief. *Id.* at 53a-64a. Respondent sought to appeal those rulings, but the court of appeals dismissed the appeal for lack of jurisdiction, *Katz* v. *United States*, No. 98-16121 (9th Cir. Sept. 21, 1998), and respondent did not seek further review.

that petitioner violated the Fourth Amendment by using constitutionally excessive force to arrest him.[5] The district court denied petitioner's motion for summary judgment on that claim, finding disputed questions of fact relevant to both the merits and the question of qualified immunity. App., *infra*, 23a-27a.

The court first examined whether summary judgment was appropriate on the merits, *i.e.*, whether or not the force petitioner used was "'objectively reasonable' in light of the facts and circumstances confronting [him], without regard to [his] underlying intent or motivation." App., *infra*, 24a. The objective reasonableness of force, the district court stated, depends on "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Ibid.* After reviewing the descriptions of the events offered by petitioner, Sergeant Parker, and respondent, *id.* at 24a-27a, and the "videotape of television news coverage of the events at the Presidio conversion ceremony," *id.* at 27a, the district court concluded that there was some dispute as to the nature of the risk respondent presented to others. *Ibid.* The court observed:

> Viewed in a light most favorable to [respondent], the videotape shows two officers, on each side of [respondent], removing him from the crowd and

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[5] Respondent asserted a similar claim against the other military police officer who participated in the arrest, Sergeant Parker, and against two supervisory officials, General Glynn C. Mallory and Major Corbin Lee. Parker was never served with the complaint, App., *infra*, 5a, 38a, and the district court granted Mallory's and Lee's motions for summary judgment because respondent produced no evidence linking them to the disputed use of force, *id.* at 30a-34a.

> carrying or pulling him toward the van. Once they arrive at the van, the officers push [respondent] into the van. Given the nature of the crime at issue and the circumstances surrounding the incident, the Court cannot conclude that the use of force was reasonable as a matter of law.

Ibid. Accordingly, the district court denied summary judgment on the merits, concluding that there was a triable issue of fact as to whether petitioner used excessive force to arrest respondent.

The district court also denied petitioner's motion for summary judgment on the issue of qualified immunity. App., *infra*, 27a-30a. Following a "two-prong" inquiry mandated by Ninth Circuit precedent, the district court first concluded that the law regarding the use of force was clearly established at the time the challenged conduct occurred. *Id.* at 28a-29a & n.1. Turning to the "next step" of the inquiry, the district court examined whether "a reasonable officer could have believed that" petitioner "acted lawfully with regard to the degree of force used to remove [respondent] from the crowd and place him inside the van." *Id.* at 29a. In "the Fourth Amendment context," the district court held, "the qualified immunity inquiry is the same as the inquiry made on the merits." *Id.* at 30a. In this case, the district court explained, it had already found that there were disputed facts precluding summary judgment on whether petitioner's use of force was reasonable. *Ibid.* It necessarily follows, the court declared, that petitioner is "not entitled to summary judgment on the basis of qualified immunity." *Ibid.*

3. The court of appeals affirmed. App., *infra*, 1a-16a. The court first rejected the government's contention that it was error to "equate[] the reasonableness test for the defense of qualified immunity with the reason-

ableness test for the merits of an excessive force claim." *Id.* at 8a. Like the district court, the court of appeals explained that, in the Ninth Circuit, the qualified immunity inquiry has two prongs. The first asks whether the legal standard or formula governing the officer's conduct is clearly established. The second asks whether a reasonable officer, applying that standard, could have believed his conduct was lawful. *Ibid.*

In excessive force cases, the court stated, the Fourth Amendment reasonableness test and the second prong of the qualified immunity analysis both focus "on the objective reasonableness of the officer's conduct." App., *infra*, 10a. "Because of this parity," the court concluded, "we have repeatedly held that the inquiry as to whether officers are entitled to qualified immunity for the use of excessive force is the same as the inquiry on the merits of the excessive force claim." *Ibid.* (internal quotation marks omitted). The court summarized:

> If genuine issues of material fact as to the amount of force used, or the circumstances that might justify the amount of force used, prevent a court from concluding as a matter of law that the force was objectively reasonable, then a material issue of fact necessarily exists as to whether an objectively reasonable officer could have believed the amount of force used was lawful.

Id. at 12a.

The court of appeals rejected the government's contention that equating the qualified immunity inquiry and the Fourth Amendment reasonableness test is inconsistent with that court's prior en banc decision in *Hammer* v. *Gross*, 932 F.2d 842, 850 (9th Cir.), cert. denied, 502 U.S. 980 (1991), and this Court's decision in *Anderson* v. *Creighton*, 483 U.S. 635, 639 (1987). App., *infra*, 12a-14a. In *Anderson*, this Court rejected the

argument that an officer who conducts an unreasonable *search* in violation of the Fourth Amendment cannot, by definition, have behaved reasonably so as to be entitled to qualified immunity. 483 U.S. at 643. In *Hammer*, the Ninth Circuit rejected the argument that "an officer who has used unreasonable *force* cannot, by definition, have acted reasonably" so as to be entitled to qualified immunity. 932 F.2d at 850 (emphasis added). Noting that this Court had rejected "a similar contention" in *Anderson*, the *Hammer* court explained:

> Whether a search is "unreasonable" within the meaning of the Fourth Amendment is an entirely different question from whether an officer reasonably could have believed his actions lawful under the Fourth Amendment. *Anderson*, 483 U.S. at 643-44 * * *. To accept Hammer's contention would be to eliminate all possibility of immunity for violations of the Fourth Amendment, an unacceptable outcome.

Ibid.

The court of appeals distinguished *Hammer* as addressing the situation, not present here, where the governing legal standard was not "clearly established" because it changed from "shock[s] the conscience" to "objective unreasonableness" when this Court decided *Graham* v. *Connor*, 490 U.S. 386 (1989), after the conduct in question had taken place. App., *infra*, 13a-14a. In a footnote, the court of appeals similarly distinguished this Court's decision in *Anderson*. *Id.* at 13a-14a n.4. That decision, the court of appeals stated, primarily "focuses on the proper formulation of the 'clearly established'" or "first prong" of the qualified immunity inquiry; it does "not address the application of the second prong of the qualified immunity analysis" (*i.e.*, whether a reasonable officer could believe the relevant

conduct lawful), the court continued, "let alone its application in excessive force cases." *Ibid.*

Having concluded that the qualified immunity inquiry does not differ from the test of reasonableness under the Fourth Amendment itself, the Ninth Circuit then turned to whether "the amount of force [petitioner] used in arresting [respondent] was so minimal that it was *per se* reasonable." App., *infra*, 14a. "The question of the reasonableness of force," the court of appeals declared, "is usually a question of fact for the jury," and summary judgment is appropriate only "when, viewing the evidence in the light most favorable to [the plaintiff], the evidence compels the conclusion that [the officer's] use of force was reasonable." *Id.* at 14a-15a n.5 (internal quotation marks omitted). In this case, the court of appeals concluded, the force used was not so minimal as to compel a finding of reasonableness.

The court noted that, according to respondent, petitioner and Sergeant Parker had seized him from behind "without warning or speaking to him," carried him about fifty feet, and forcefully pushed him inside the van. App., *infra*, 15a. On the whole, the court appeared to conclude, that constituted a disproportionate response. "Unfurling a banner," the court of appeals stated, is not a severe crime; respondent was a sixty-year-old man wearing a leg brace; and, "[f]rom all that appears at this stage of the case," respondent was not "armed or dangerous," and "did not pose an immediate threat to the safety of the officers or anyone else." *Ibid.* The court concluded that summary judgment was properly denied, holding that, viewing the facts most favorably to respondent, "no reasonable officer could have believed that the amount of force used was lawful." *Ibid.* The court of appeals denied rehearing en banc. *Id.* at 65a-66a.

REASONS FOR GRANTING THE PETITION

Last Term, this Court granted the petition for a writ of certiorari in *Snyder* v. *Trepagnier*, cert. granted, 525 U.S. 1098 (1999) (No. 98-507), to resolve whether, in an excessive force case under the Fourth Amendment, the same legal standard governs both the question of qualified immunity and the question of reasonableness under the Fourth Amendment itself. That case, however, settled before decision. See 526 U.S. 1083 (1999) (dismissing the writ). This case presents the same issue. In conflict with the decisions of at least six other circuits, the court of appeals below held that the test for qualified immunity and the test of reasonableness under the Fourth Amendment are identical, App., *infra*, 2a, 8a, 10a, 16a, and further concluded that qualified immunity must be denied because the force petitioner employed was not "so minimal that it was *per se* reasonable," *id.* at 14a. The Ninth Circuit's application of the doctrine of qualified immunity to the facts of this case, moreover, effectively creates a de facto no-force rule for many arrests, and invites inappropriate second-guessing of an officer's on-the-spot judgment. Further review is therefore warranted.

1. In *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982), this Court held that qualified immunity precludes a government official from being held liable for unconstitutional conduct unless the official violates "clearly established statutory or constitutional rights of which a reasonable person would have known." The qualified immunity inquiry is an objective one. Immunity may be denied only "if, on an objective basis, it is obvious that no reasonably competent officer would have concluded" that the actions were constitutional. *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986). Thus, "if officers of reasonable

competence could disagree on" the lawfulness of the conduct, "immunity should be recognized." *Id.* at 341.

In *Anderson* v. *Creighton*, 483 U.S. at 639, this Court clarified that immunity may not be denied simply because "the relevant 'legal rule'" was "clearly established" at a high "level of generality." Thus, the Court explained, it is not enough to show that the right to be free from unreasonable searches and seizures was "clearly established," or that the applicable legal standard or formula had been settled by the courts. *Ibid.* To the contrary:

> [T]he right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that *what he is doing* violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful * * * but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Id. at 640 (emphasis added). The qualified immunity standard thus "'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" *Hunter* v. *Bryant*, 502 U.S. 224, 229 (1991) (per curiam) (quoting *Malley*, 475 U.S. at 343, 341).

In *Anderson*, this Court also declined to carve out an exception to the qualified immunity doctrine for Fourth Amendment claims, even though both the qualified immunity inquiry and the Fourth Amendment itself incorporate reasonableness tests. 483 U.S. at 643-646. The Court explained that it had previously applied qualified immunity in Fourth Amendment cases, *id.* at

643; rejected arguments based on the coincidence of language in the qualified immunity test and the Fourth Amendment (*i.e.*, that both use the word "reasonable"), *ibid.*; and declared that law enforcement officers who reasonably, but mistakenly, believe their conduct to be consistent with the Fourth Amendment's requirement of reasonableness "should no more be held personally liable in damages than should officials making analogous determinations in other areas of law," *id.* at 644.

a. Notwithstanding *Anderson*, the courts of appeals are divided on whether the qualified immunity inquiry is superfluous in Fourth Amendment excessive force cases. In the decision below, the Ninth Circuit held that it is. "[T]he inquiry as to whether officers are entitled to qualified immunity for the use of excessive force," that court held, "is the same as the inquiry on the merits of the excessive force claim." App., *infra*, 10a (quoting *Alexander* v. *County of Los Angeles*, 64 F.3d 1315, 1322 (9th Cir. 1995)).[6] That holding accords with decisions of the Sixth and Tenth Circuits. See *Street* v. *Parham*, 929 F.2d 537, 540, 541 n.2 (10th Cir. 1991) (once factfinder determines that "the force used was unnecessary under the circumstances, any question of objective reasonableness" for qualified immunity purposes "has also been foreclosed"); *Holt* v. *Artis*, 843 F.2d 242, 246 (6th Cir. 1988) (similar); *Bass* v. *Robinson*, 167 F.3d 1041, 1051 (6th Cir. 1999) (similar).[7]

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[6] See also App., *infra*, 2a ("[W]e have held that the reasonableness inquiry on the merits of a Fourth Amendment excessive force claim is the same as the reasonableness inquiry posed by a qualified immunity defense."); *id.* at 8a ("[W]e have equated the reasonableness test for the defense of qualified immunity with the reasonableness test for the merits of an excessive force claim."); *id.* at 16a (similar).

[7] The D.C. Circuit has also stated that "whether an officer used excessive force and whether an officer is entitled to qualified im-

The First, Second, Fourth, Fifth, Eighth and Eleventh Circuits, however, have reached the opposite conclusion. Those courts of appeals have concluded that, in excessive force cases, the test for qualified immunity differs from the substantive test of reasonableness under the Fourth Amendment. *Finnegan* v. *Fountain*, 915 F.2d 817, 822-823 (2d Cir. 1990) (even if officer exerts "constitutionally excessive force," qualified immunity is appropriate unless it "should have been apparent" that the "particular degree of force under the particular circumstances was excessive"); *Slattery* v. *Rizzo*, 939 F.2d 213, 215 (4th Cir. 1991) ("There is no principled reason not to allow a defense of qualified immunity in an excessive use of force claim."); *Brown* v. *Glossip*, 878 F.2d 871, 873 (5th Cir. 1989) ("We can discern no principled distinction between the availability of qualified immunity as a defense to unreasonable searches * * * under the fourth amendment and as a defense to an excessive force claim also grounded in the fourth amendment."); *Napier* v. *Town of Windham*, 187 F.3d 177, 188 (1st Cir. 1999) (because officer "*could have reasonably believed*" that the force "was justified and lawful," he was, "under the standard enunciated in *Anderson*, * * * entitled to qualified immunity * * *, whether [there was] a viable Fourth Amendment violation or not"); *Landrum* v. *Moats*, 576 F.2d 1320,

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munity" is "determined according to a single standard." *Scott* v. *District of Columbia*, 101 F.3d 748, 759 (1996), cert. denied, 520 U.S. 1231 (1997). The actual standard used by the D.C. Circuit, however, implicitly recognizes the possibility of different outcomes regarding *excessiveness* under the Fourth Amendment on the one hand and the *reasonableness* of an officer's *belief* in the lawfulness of the conduct on the other. In particular, the D.C. Circuit asks whether "*the excessiveness* of the force is *so apparent* that *no reasonable officer* could have believed in the lawfulness of his actions." *Ibid.* (emphasis added; quotation marks omitted).

1327-1328 (8th Cir.) ("The defense of good faith is not * * * inapplicable to an action based on excessive force."), cert. denied, 439 U.S. 912 (1978);[8] *Gold* v. *City of Miami*, 121 F.3d 1442, 1446 (11th Cir. 1997) (lawfulness of non-deadly force analyzed on a "case-by-case basis," but qualified immunity appropriate "unless application of the [excessive force] standard would inevitably lead a reasonable officer in the defendant's position to conclude that the force was unlawful") (internal quotation marks omitted), cert. denied, 525 U.S. 870 (1998).[9] That division in appellate authority, repeatedly

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[8] See also *McGruder* v. *Heagwood*, 197 F.3d 918, 920 (8th Cir. 1999) ("objectively reasonable police officers could have believed that they were not using excessive force, though this belief may have been erroneous"). Other Eighth Circuit cases, however, have treated the issue as if it were unresolved. See, *e.g.*, *Nelson* v. *County of Wright*, 162 F.3d 986, 990 n.5 (1998) (declining to "analyze whether there is any conceptual difference in the standards" for qualified immunity and Fourth Amendment reasonableness).

[9] The court of appeals in this case erroneously suggested (App., *infra*, 11a) that the Second, Fourth, and Seventh Circuits equate the qualified immunity and Fourth Amendment merits inquiries in excessive force cases. The Second Circuit expressly reached the opposite conclusion in *Finnegan*, 915 F.2d at 822-824, and reaffirmed that conclusion again in *Oliveira* v. *Mayer*, 23 F.3d 642, 648 (2d Cir. 1994), cert. denied, 513 U.S. 1076 (1995). Although the court of appeals in this case cited *Thomas* v. *Roach*, 165 F.3d 137 (2d Cir. 1999), for the contrary position, App., *infra*, 11a, *Thomas* does not pass on the issue. The Fourth Circuit has also rejected the claim that the inquiries are identical, *Slattery*, 939 F.2d at 215, and nothing in *Rowland* v. *Perry*, 41 F.3d 167, 173 (4th Cir. 1994) (cited App., *infra*, 11a) states otherwise. Nor does the Seventh Circuit necessarily equate the two inquiries. *Frazell* v. *Flanigan*, 102 F.3d 877, 886-887 (7th Cir. 1996) (cited App., *infra*, 11a), comments favorably on equating them in the "somewhat unique" context of that case, but there is contrary Seventh Circuit authority as well. For example, *Ellis* v. *Wynalda*, 999 F.2d 243, 246 n.2 (7th Cir. 1993), specifically declines to equate the inquiries, declaring

noted by the courts of appeals,[10] is sufficiently well developed that, just last Term, this Court granted certiorari to resolve it. See *Snyder* v. *Trepagnier*, 525 U.S. 1098 (1999) (No. 98-507). Because the parties settled *Snyder* just before argument, however, the petition was dismissed, 526 U.S. 1083 (1999), and the conflict remains unresolved.

b. The court of appeals' decision in this case, moreover, is inconsistent with this Court's decision in *Anderson* v. *Creighton*, *supra*. The Ninth Circuit and the other courts of appeals that equate the qualified immunity inquiry with the reasonableness test of the Fourth Amendment rely on the fact that both inquiries

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that "the doctrine of qualified immunity still serves an important purpose in cases of alleged excessive force." Nor has the First Circuit equated the two inquiries. The language from *Roy* v. *Inhabitants of City of Lewiston*, 42 F.3d 691, 695 (1st Cir. 1994), quoted App., *infra*, 11a, refers to the fact that, in that case, the result would not have changed "even if the qualified immunity defense had not been raised." 42 F.3d at 695. *Roy* itself, however, acknowledges that "substantive liability and qualified immunity are two separate questions," *ibid.*, and the First Circuit has (since deciding *Roy*) encountered at least one excessive force case in which, even if a Fourth Amendment violation occurred, immunity was nonetheless appropriate. *Napier*, 187 F.3d at 188.

[10] See, *e.g.*, *Snyder* v. *Trepagnier*, 142 F.3d 791, 801 n.10 (5th Cir. 1998) ("Some other circuits disagree and take the position that a finding of excessive force precludes a finding of qualified immunity."); *Slattery*, 939 F.2d at 215-216 (noting conflict); App., *infra*, 11a (citing *Snyder* as contrary authority). The issue has also generated intracircuit conflicts. The Ninth Circuit has characterized the decision below as "*resolving an apparent intracircuit conflict* between excessive force cases that equated the inquiry on the merits with the qualified immunity analysis and other cases that suggested the two lines of inquiry are distinct." *Headwaters Forest Defense* v. *County of Humboldt*, No. 98-17250, 2000 WL 531004, at *18 (May 4, 2000) (emphasis added). See also note 9, *supra* (noting Seventh Circuit cases).

are framed in terms of "objective reasonableness." In essence, those courts reason that it is not possible for the force to be objectively reasonable for purposes of the qualified immunity inquiry, while also being objectively unreasonable for purposes of the Fourth Amendment itself. See, *e.g.*, App., *infra*, 10a (finding "parity" because both the immunity defense "and the merits of an excessive force claim focus on the objective reasonableness of the officer's conduct"); *Parham*, 929 F.2d at 540, 541 n.2 (if "the force used was unnecessary" and violated the Fourth Amendment, "any question of objective reasonableness" for qualified immunity purposes "has also been foreclosed" because "[n]o officer could reasonably believe that the use of unreasonable force did not violate clearly established law").

This Court, however, rejected virtually indistinguishable reasoning in *Anderson*. In that case too, the plaintiffs argued that the test for qualified immunity merely duplicates the Fourth Amendment merits inquiry because both require reasonableness; it "is not possible," they argued, "to say that one 'reasonably' acted unreasonably." 483 U.S. at 643. This Court rejected that argument as "unpersuasive," *ibid.*, because it relies on the coincidence of language—the common use of the word "reasonable"—in the qualified immunity test and in the Fourth Amendment. If the Fourth Amendment had been written to speak of "undue" searches and seizures, the Court explained, the fallacy of the argument would be apparent, even though the meaning of the Amendment would be unchanged:

> [The argument's] surface appeal is attributable to the circumstance that the Fourth Amendment's guarantees have been expressed in terms of "unreasonable" searches and seizures. Had an equally serviceable term, such as "undue" searches and

> seizures been employed, what might be termed the "reasonably unreasonable" argument against application of *Harlow* to the Fourth Amendment would not be available—just as it *would* be available against application of *Harlow* to the Fifth Amendment if the term "reasonable process of law" had been employed there. The fact is that, regardless of the terminology used, the precise content of most of the Constitution's civil-liberties guarantees rests upon an assessment of what accommodation between governmental need and individual freedom is reasonable * * *. Law enforcement officers whose judgments in making these difficult determinations are objectively legally reasonable [although ultimately mistaken] should no more be held personally liable in damages than should officials making analogous determinations in other areas of law.

Id. at 643-644. The same analysis forecloses the Ninth Circuit's reasoning here. See *Oliveira* v. *Mayer*, 23 F.3d 642, 648 (2d Cir. 1994) (*Anderson* "authoritatively instructed that the objective reasonableness component of the inquiry as to lawfulness is not the same as the objective reasonableness component of the inquiry as to qualified immunity"), cert. denied, 513 U.S. 1076 (1995); *Karnes* v. *Skrutski*, 62 F.3d 485, 491-492 n.3 (3d Cir. 1995) (the attempt to equate the two inquiries "misconstrues the nature of qualified immunity, and in any case has been rejected by the Supreme Court").[11]

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[11] This Court's decision in *Graham* also suggests that qualified immunity should be available in excessive force cases. In that case, the Court observed that "the officer's *objective* 'good faith'—that is, whether he could reasonably have believed that the force used did not violate the Fourth Amendment—may be relevant to the availability of the qualified immunity defense to monetary liability under § 1983." 490 U.S. at 399 n.12 (citing *Anderson*). The

The Ninth Circuit's contrary approach overlooks the fact that "objective reasonableness" serves distinct functions in the Fourth Amendment and qualified immunity inquiries. When a jury or a court determines whether constitutionally excessive force has been used in violation of the Fourth Amendment, it articulates a standard to govern the conduct of an officer confronting a certain set of facts, *i.e.*, it decides whether the officer's conduct was "objectively reasonable." *Graham* v. *Connor*, 490 U.S. 386, 397 (1989). But when a decisionmaker resolves the question of immunity, it asks a different question—whether that standard of conduct was sufficiently *obvious* in the first instance that it would be unreasonable to have reached the opposite conclusion. Although both inquiries use the term "reasonable" (or its converse, "unreasonable"), they employ that term for different purposes and in different senses. With respect to the Fourth Amendment itself, reasonableness defines the boundaries of lawful conduct. In the immunity context, it defines the often wider boundaries of what an officer, because of a lack of clarity in the legal standard *or* its application to the specific facts of the case, could *understandably have believed* to be lawful.

Thus, the determination that an officer's use of force was "unreasonable" for Fourth Amendment purposes does not preclude a determination that the question was sufficiently close that reasonable officers (or reasonable judges or jurors) could have disagreed about

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Court also stated that, "[s]ince no claim of qualified immunity has been raised in this case, * * * we express no view on its *proper application* in excessive force cases." *Ibid.* (emphasis added). That sentence on its face reserves the question *how* qualified immunity applies in excessive force cases, and not—as the court of appeals mistakenly believed, App., *infra*, 14a n.4—*whether* it applies.

that conclusion in advance. As the Second Circuit has explained, "to say that the use of constitutionally excessive force violates a clearly established right * * * begs the open question whether the particular degree of force under the particular circumstances was" so clearly "excessive" that only a plainly incompetent officer could have thought otherwise. *Finnegan*, 915 F.2d at 823-824. In other words, a Fourth Amendment violation occurs when, even taking into account the deference owed to the split-second decisions of officers, the conduct turns out to have been, on balance, objectively unreasonable. But immunity is nonetheless appropriate unless that conduct "was so far beyond" the sometimes "hazy border between excessive and acceptable force that [the official] had to know he was violating the Constitution," *i.e.*, unless "application of the [excessive force] standard would inevitably lead every reasonable officer in [the defendants'] position to conclude the force was unlawful." *Priester* v. *City of Riviera Beach*, 208 F.3d 919, 926-927 (11th Cir. 2000); *Post* v. *City of Fort Lauderdale*, 7 F.3d 1552, 1559 (1993), amended, 14 F.3d 583 (11th Cir. 1994).[12]

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[12] Although findings of excessive force and qualified immunity are not necessarily inconsistent, they are not necessarily consistent either. In some cases, there will be no set of facts supported by the evidence under which the officer's conduct could both be unconstitutional and sufficiently close to an unclear constitutional boundary to warrant immunity. That frequently may be true in cases involving the use of deadly force, since those cases are often governed by a bright-line rule and liability often turns on historical facts, such as whether the plaintiff was (or the officer reasonably thought the plaintiff was) armed and dangerous. See *Tennessee* v. *Garner*, 471 U.S. 1, 11 (1985). Even in deadly force cases, however, the results of the excessive force inquiry and the qualified immunity test can diverge, not only because open legal questions under *Garner* remain, but also because *Garner*'s application to the par-

Attempting to reconcile its decision with this Court's decision in *Anderson*, the Ninth Circuit pointed out that, under its precedents, qualified immunity is examined in two steps: first by asking whether the "law"—by which the Ninth Circuit means the governing factors, legal formula, or standard—"was clearly established";[13] second by examining whether a reasonable officer could have believed his conduct to be lawful under that standard. App., *infra*, 8a. This "Court's qualified immunity discussion in *Anderson*," the court of appeals stated, "focuses on the proper formulation of the 'clearly established'" step, or "the first prong" of that analysis, and does not "address the application of the second prong of the qualified immunity analysis," which is whether a reasonable officer could have believed his conduct to be lawful. *Id.* at 13a-14a n.4. That distinction is unpersuasive for two reasons.

First, *Anderson* does not contemplate dividing the qualified immunity inquiry into two distinct "prongs," one involving whether there was "clearly established" law, and the other involving whether a reasonable officer could have believed his conduct to be lawful. Instead, *Anderson* makes it clear that the Ninth Circuit's second prong (whether a reasonable officer could have thought the conduct lawful) is how courts should decide the first (whether the law is "clearly established"). As this Court explained in *Anderson* itself,

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ticular facts confronting an officer does not always yield an undebatably certain result.

[13] See *Headwaters Forest Defense*, No. 98-17250, 2000 WL 531004, at *18 (declaring that "the law concerning the use of excessive force is clearly established" even though its application in the particular factual context was "unprecedented," because "the law under *Graham* and its progeny concerning the relevant factors for assessing the limits on police use of force under the Fourth Amendment" are well established).

the law is "clearly established" for purposes of qualified immunity only if "[t]he contours of the right" are "sufficiently clear that a reasonable official would understand that *what he is doing* violates that right." 483 U.S. at 640 (emphasis added); *Wilson* v. *Layne*, 526 U.S. 603, 614-615 (1999) ("'Clearly established' for purposes of qualified immunity means that '[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'"). If reasonable officers could have disagreed on whether the conduct was lawful, the law was *not* "clearly established" and immunity must be recognized; in contrast, if reasonable officers could not have disagreed, the law was clear. *Malley*, 475 U.S. at 341. *Anderson* thus cannot be distinguished as relating to "prong one" instead of "prong two" of the Ninth Circuit's two-prong qualified immunity test because, under *Anderson*, the Ninth Circuit's two "prongs" are different ways of asking a single question.

Second, the court of appeals erred in asserting (App., *infra*, 13a-14a n.4) that *Anderson* addresses the Ninth Circuit's first prong (whether the governing standard was clearly established) rather than the second (whether an officer could have thought his conduct lawful). In fact, in *Anderson* there was no dispute about the "first prong" because the standard governing the officer's conduct—there, a warrantless search—was not in dispute.[14] The only question in *Anderson* was whether

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[14] *Anderson* concerned officers who allegedly searched a home for a fugitive, without a warrant, in the absence of probable cause and exigent circumstances. The legal standards and verbal formulae governing such conduct were well settled before the incident that gave rise to that case. *Anderson*, 483 U.S. at 640; *Johnson* v. *United States*, 333 U.S. 10 (1948); *Steagald* v. *United States*, 451 U.S. 204 (1981); *Payton* v. *New York*, 445 U.S. 573, 578 (1980); *Wong Sun* v. *United States*, 371 U.S. 471, 479 (1963).

qualified immunity protected officers who might have erred in applying the established standard, *i.e.*, in determining that probable cause and exigent circumstances were present on the facts before them. See 483 U.S. at 640-641 (court of appeals erred by refusing to consider, on qualified immunity, "the argument that it was *not* clearly established that the circumstances with which Anderson was confronted did not constitute probable cause and exigent circumstances"). See also *Hunter*, 502 U.S. at 228 (officers entitled to immunity "if a reasonable officer could have believed" probable cause existed). Thus, in *Anderson* itself, this Court held that the relevant question for qualified immunity is "whether a reasonable officer could have believed Anderson's warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed." 483 U.S. at 641. That *is* what the Ninth Circuit considers to be the second prong, expressed in nearly identical language. See App., *infra*, 8a (under second prong, court asks whether "a reasonable official could have believed the conduct was lawful").[15]

c. Equating the qualified immunity inquiry with the Fourth Amendment reasonableness standard in excessive force cases, moreover, fundamentally undermines a critical function served by qualified immunity. Qualified immunity is "an *immunity from suit* rather than a mere defense to liability." *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985). Consequently, this Court "repeatedly

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[15] The Ninth Circuit also distinguished *Anderson* as a case about warrantless searches rather than excessive force, App., *infra*, 14a n.4, but the Ninth Circuit offered no reason for treating the two Fourth Amendment claims differently. See *Slattery*, 939 F.2d at 215 (finding "no principled reason" for distinguishing qualified immunity in excessive force cases from qualified immunity in other Fourth Amendment cases); *Brown*, 878 F.2d at 873 (similar).

ha[s] stressed the importance of resolving immunity questions at the earliest possible stage in litigation," so that officers do not "err always on the side of caution because they fear being sued." *Hunter*, 502 U.S. at 227, 229 (internal quotation marks omitted).

Equating qualified immunity with Fourth Amendment reasonableness is inconsistent with that requirement. In the Ninth Circuit (and elsewhere in practice), "[t]he question of the reasonableness of force" under the Fourth Amendment "is usually" treated as "a question of fact for the jury," and therefore generally must be resolved at trial. App., *infra*, 14a n.5; *Roy* v. *Inhabitants of City of Lewiston*, 42 F.3d 691, 694-695 (1st Cir. 1994) ("Judgments about reasonableness are usually made by juries in arguable cases, even if there is no dispute about what happened."). By equating qualified immunity with substantive Fourth Amendment reasonableness, the Ninth Circuit effectively requires the question of qualified immunity in excessive force cases generally to be resolved at trial as well. Indeed, under the Ninth Circuit's approach, summary judgment on qualified immunity must be denied unless "the evidence *compels* the conclusion that [the officer's] use of force was reasonable." App. *infra*, 15a n.5 (emphasis added). That standard, however, is virtually indistinguishable from the one this Court rejected in *Hunter* v. *Bryant*, precisely because "it routinely places the question of immunity in the hands of the jury." 502 U.S. at 228.[16]

The Ninth Circuit's approach, moreover, turns the qualified immunity inquiry on its head. Summary judg-

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[16] In *Hunter*, the Ninth Circuit stated that "[w]hether a reasonable officer could have believed he had probable cause is a question for the trier of fact, and summary judgment * * * based on lack of probable cause is proper only if there is only one reasonable conclusion a jury could reach." 502 U.S. at 228.

ment should not be *limited* to cases where the force was so clearly reasonable as to "compel[]" the conclusion that it was lawful. App., *infra*, 15a n.5. Quite the opposite: Summary judgment on qualified immunity is *required* unless (viewing the facts in the light most favorable to the plaintiff) the standards and relevant cases "truly compel (not just suggest or allow or raise a question about), the conclusion * * * that what defendant [did] violates federal law in the circumstances." *Priester*, 208 F.3d at 927. Thus, qualified immunity serves an "important purpose" at summary judgment in excessive force cases, because it permits the entry of judgment not only where no one could think the force unreasonable, but also where "reasonable minds could differ." *Ellis* v. *Wynalda*, 999 F.2d 243, 246 n.2 (7th Cir. 1993).

2. This case, moreover, illustrates the importance of distinguishing the Fourth Amendment merits question from the qualified immunity inquiry in unreasonable force cases. As the district court noted, petitioner asserts qualified immunity for (1) the "degree of force used to remove [respondent] from the crowd," and (2) the force used to "place [respondent] inside the van." App., *infra*, 29a. See also *id.* at 27a (analyzing the two uses of force). Whatever one might think of the constitutionality of those uses of force, neither was so clearly unreasonable that no officer could have thought it to be lawful at the time.

a. As to the first use of force, petitioner and Sergeant Parker removed respondent from the crowd by each taking one of his arms, lifting him, and rushing him out to the police van. See pp. 3-4, *supra*; App., *infra*, 4a, 24a-25a; *id.* at 27a (describing videotape). The Ninth Circuit denied qualified immunity for that conduct, concluding that "no reasonable officer could have believed that" grabbing hold of respondent "without warning or

speaking to him" and partially carrying him from the crowd "was necessary under the circumstances," *id.* at 15a, because respondent's crime was not serious and respondent did not pose an immediate threat to public safety.[17] The court stated:

> Unfurling a banner at a public event does not appear to be a particularly severe crime. Katz was

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[17] The Ninth Circuit's use of the phrase "no reasonable officer" echoes a component of the qualified immunity standard required by *Anderson* v. *Creighton*. That does not mean, however, that the Ninth Circuit articulated and applied the correct standard under *Anderson*. To the contrary, the Ninth Circuit held that the relevant immunity standard could not be met (and summary judgment was improper) unless "the amount of force [petitioner] used in arresting [respondent] was *so minimal* that it was *per se* reasonable." App., *infra*, 14a (emphasis added). That latter articulation is clearly at odds with any notion of resolving close questions in favor of the officer, as qualified immunity ordinarily requires. See *Hunter*, 502 U.S. at 235 (Kennedy, J., concurring) (given that doubt "has been expressed" on "whether the Court of Appeals applied the correct legal standard to resolve the qualified immunity issue on summary judgment," it would be appropriate to "set the case for full briefing and oral argument."). Indeed, the court of appeals held that even close cases must be resolved at trial because the "reasonableness of force"—a question the court of appeals equated with the qualified immunity inquiry—"is usually a question of fact for the jury," and can be resolved on summary judgment only when "the evidence *compels the conclusion* that [the officer's] use of force was reasonable." App., *infra*, 14a-15a n.5 (emphasis added). As explained above, that approach turns the inquiry upside down; it is precisely where reasonable minds could differ on the force's reasonableness that immunity is appropriate. See pp. 23-24, *supra*. Second, the court of appeals improperly focuses on the issue of "necess[ity]." App., *infra*, 10a, 11a, 15a. The question for qualified immunity purposes, however, is whether an officer could reasonably have thought the amount of force employed to be *reasonable* and thus lawful. Cf. *Seekamp* v. *Michaud*, 109 F.3d 802, 807-808 (1st Cir. 1997) (officer not required to use the least intrusive degree of force possible).

> sixty years old and wearing a leg brace. There is no indication he was armed or dangerous. From all that appears at this stage of the case, he did not pose an immediate threat to the safety of the officers or anyone else.

Ibid.

By holding that the use of such minimal force is not only unreasonable, but *so obviously* unreasonable that no officer could have thought it lawful, the Ninth Circuit has effectively held that, in cases like this, officers are prohibited from using *any force at all* to make an arrest. That suggestion is difficult to reconcile with this Court's decision in *Graham*, which recognizes "that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." 490 U.S. at 396. It conflicts with cases from other circuits.[18] And it conflicts with common sense. The officers were

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[18] See, *e.g.*, *Curd* v. *City Court*, 141 F.3d 839, 841 (8th Cir.) (where officer "seized [arrestee's] arm, spun her around and told her to get into the police car," the "limited amount of force" was not "objectively unreasonable" under *Graham*, "[e]ven if * * * unnecessary to effect the arrest," especially given that the plaintiff "does not allege, and there is no evidence, that she was injured or experienced physical pain"), cert. denied, 525 U.S. 888 (1998); *Hinton* v. *City of Elwood*, 997 F.2d 774, 781 (10th Cir. 1993) (similar). Indeed, the Eleventh Circuit has, in a long line of cases, repeatedly applied the "de minimis" label to uses of force that exceed the amount used in this case. *Nolin* v. *Isbell*, 207 F.3d 1253, 1255-1258 (2000) (summarizing). See, *e.g.*, *Jones* v. *City of Dothan*, 121 F.3d 1456, 1460 (11th Cir. 1997) (immunity proper where officer "slammed" the plaintiff against a wall and "kicked his legs apart," causing him to suffer pain). We do not preclude the possibility that, in some circumstances, the only reasonable amount of force is no force at all. As explained in text, however, the minimal force used in this case was not so obviously unreasonable that no officer could have thought it lawful.

confronted with the possibility of escalation (other potential protestors were in the crowd) and charged with ensuring the safety of the Vice President, who stood only steps away. According to the court of appeals, the officers' use of surprise to their advantage in those circumstances—by seizing respondent (who was openly flouting the bar on banners) quickly and whisking him away—was unreasonable; instead, the court of appeals suggested, the officers should have "warn[ed] or sp[oken] to" respondent first. App., *infra*, 15a. We know of no decision of this Court holding that the police, confronted with a suspect who openly defies the law, must discuss the possibility of seizure with him in advance and thus may not use surprise to take him into custody quickly. Even if the Fourth Amendment were construed as containing such a requirement, petitioner surely was not "plainly incompetent" not to have known that at the time. *Malley*, 475 U.S. at 341.

b. With respect to the force used to place respondent in the van, the court of appeals suggested that, because respondent denies resisting, it may not have been necessary to push respondent inside. App., *infra*, 15a. But "'[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers,' *Johnson* v. *Glick*, 481 F.2d [1028, 1034 (2d Cir.), cert. denied, 414 U.S. 1033 (1973)], violates the Fourth Amendment." *Graham*, 490 U.S. at 396. *A fortiori*, a single push, later deemed unnecessary, cannot be so *clearly unconstitutional* as to defeat qualified immunity.

Nor does it matter that respondent, in his complaint and his court of appeals brief, claimed that he was shoved "violently." See App., *infra*, 15a. As an initial matter, the shove to which respondent refers did *not*

come from petitioner—it came from Sergeant Parker[19] —and the Ninth Circuit nowhere articulated any basis for holding petitioner liable for Parker's conduct. Besides, merely quoting the adverb "violently" from the complaint cannot substitute for reasoned analysis of whether the admissible evidence shows force that was so clearly excessive as to render qualified immunity inappropriate. See Fed. R. Civ. P. 56(e) (party may not "rest upon the mere allegations" of a pleading to defeat a properly supported motion for summary judgment).[20] Here, after reviewing a videotape of the actual events in question, the district court declared that, when viewed "in a light most favorable to" respondent, the tape showed the officers "removing" respondent from the crowd, "carrying or pulling him" toward the van, and "push[ing]" or "placing" him inside. App., *infra*, 27a. The videotape itself—which is being lodged with this Court—not only confirms that analysis, but dispels the notion that the force petitioner used was so excessive as to be clearly and obviously unlawful.

c. The court of appeals, moreover, fundamentally erred by employing hindsight to second-guess the per-

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[19] The videotape makes that clear. As respondent is placed into the van, Sergeant Parker appears on the right side of the screen; petitioner appears on the left, wearing glasses. See Saucier Dep. 24; Parker Dep. 58.

[20] The characterization of the push as "violent[]," even if accepted, does not itself establish that qualified immunity should have been denied. Black's defines "violently" as "[b]y the use of force; forcibly," *Black's Law Dictionary* 1570 (6th ed. 1990), and "violent" as "characterized" by "physical force, especially by extreme and sudden or by unjust or improper force." *Ibid.* Consequently, the inclusion of the word "violently" in the complaint merely underscores the fact that the push involved force, and potentially "unjust and improper" force. It does not demonstrate that the force used was so extreme and unjustified that no reasonable officer could have thought it lawful.

ceptions and actions of the officers on the scene. Fourth Amendment and qualified immunity issues, this Court has admonished, must be examined from "the perspective of a reasonable officer on the scene," 490 U.S. at 396, and should not be reconstructed in view of the more expansive knowledge that extensive litigation and leisurely examination can produce years later. See *Hunter*, 502 U.S. at 228 ("the court should ask whether the agents acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact").

In this case, the court of appeals repeatedly ignored those admonitions. First, without acknowledging the atmosphere of uncertainty confronting the officers, the court of appeals faulted their treatment of respondent because, "at this stage of the case," it "appears" that respondent posed no "immediate threat." App., *infra*, 15a. See also *ibid.* (relying on the fact that "[t]here *is* no indication" that respondent was armed or dangerous) (emphasis added). The relevant question, however, is not what "appears" now, after years of litigation; the question instead is what the police knew at the time. *Hunter*, 502 U.S. at 228. Thus, the court of appeals also erroneously attributed significance to the fact that respondent was wearing a leg brace, App., *infra*, 15a, 27a, when there was no evidence that either officer was aware of the brace, and respondent testified that the brace was *underneath* the leg of his trousers. Resp. Dep. 34; Parker Dep. 47; Saucier Dep. 17.

Similarly, the court of appeals mistakenly thought summary judgment was defeated by respondent's claim that he did not resist being placed in the van, App., *infra*, 15a, when the relevant inquiry is whether—accepting respondent's assertion that he did not resist—the officers reasonably could have *believed* that re-

spondent was resisting. It is undisputed that respondent took actions that could have created the appearance of resistance: petitioner testified that respondent resisted by putting his feet on the van's bumper and pushing away, *id.* at 25a, while respondent testified that he put his feet on the van's entry or the bumper as the officers attempted to place him inside, Resp. Dep. 40-41.

The court of appeals thus engaged in—and invited—precisely the sort of omniscient hindsight analysis that qualified immunity and the Fourth Amendment both forbid. By denying qualified immunity, the court in effect established a rule that law enforcement officers making an arrest may use no more force than absolutely necessary and, in many cases, may use no force at all. That rule is unsupported by precedent, and in any event is not so clearly established as to defeat qualified immunity.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 2000

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-16298

ELLIOT M. KATZ; IN DEFENSE OF ANIMALS
PLAINTIFFS-APPELLEES

v.

UNITED STATES OF AMERICA; CORBIN LEE, MAJOR;
BRIAN O'NEILL; STEVEN PARKER, SERGEANT;
GLYNN C. MALLORY, JR., GENERAL, DEFENDANTS
AND
DONALD SAUCIER, PRIVATE, DEFENDANT-APPELLANT

Appeal from the United States District Court for the Northern District of California

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[Filed: Oct. 22, 1999]

Before: THOMPSON and GRABER, Circuit Judges, and CARROLL, District Judge.[1]

DAVID R. THOMPSON, Circuit Judge:

Army Private Donald Saucier ("Saucier"), acting as a military police officer, arrested Elliot M. Katz ("Katz")

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[1] The Honorable Earl H. Carroll, United States Senior District Judge for the District of Arizona, sitting by designation.

during a public event at the San Francisco Presidio. Katz was holding up a sign when he was arrested. According to Katz, Saucier and another officer grabbed him, tore the sign out of his hands, dragged him fifty feet, and violently tossed him into a van. Katz brought a *Bivens* action against Saucier and others for violations of his constitutional rights. *See Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L.Ed.2d 619 (1971). Saucier filed a motion for summary judgment, contending he was entitled to qualified immunity. The district court denied Saucier's motion as to Katz's Fourth Amendment claim, which was grounded on Saucier's alleged use of excessive force in effecting Katz's arrest. Saucier appeals.

Saucier contends that, although our circuit has a long line of cases in which we have held that the reasonableness inquiry on the merits of a Fourth Amendment excessive force claim is the same as the reasonableness inquiry posed by a qualified immunity defense, these cases conflict with our en banc holding in *Hammer v. Gross*, 932 F.2d 842, 850 (9th Cir. 1991). We disagree, and affirm the district court.

FACTUAL BACKGROUND[2]

This case arises out of Katz's arrest for his conduct during a speech given by Vice President Gore at the Presidio Army base in San Francisco. Katz, an animal rights activist, seeks damages from Saucier for violating his Fourth Amendment rights by using excessive

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[2] Consistent with the standard of review on summary judgment, the facts are presented in the light most favorable to Katz. *See Margolis v. Ryan*, 140 F.3d 850, 852 (9th Cir. 1998).

force. This claim is one of multiple claims brought by Katz and In Defense of Animals ("IDA"), an animal rights organization of which Katz is president, against the United States, a national parks official, and various military officials.

On September 24, 1994, the public was invited to attend a special presentation by Vice President Gore, followed by other speakers, on the main post at the Presidio. The event was to celebrate the anticipated conversion of most of the Presidio to a national park. The conversion of the Presidio was a subject of public controversy, with animal rights activists concerned about the possibility of animal experimentation at the Army's Letterman Hospital.

Katz, a veterinarian who was then sixty years old, and other members of IDA were among the several hundred members of the public who attended the event. Katz arrived early and sat at the front of the public seating area, which was separated from the stage and dignitary seating area by a waist-high cyclone fence. He was wearing a visible, knee-high leg brace because of a broken foot. He was not wearing a shoe on his injured foot.

On the day of the event, Saucier was working as a military police officer. In his deposition, Saucier testified that he had been told by his superiors that demonstrations would not be allowed. He had been instructed to "diffuse the situation if it arises," but not to "draw that much attention if we didn't have to." Saucier admits that Katz was "pointed out as one of the potential, you know, activists" and that he knew "who this person was . . . the person we need[ed] to keep an eye on."

Either before or as Vice President Gore began speaking, Katz silently removed a cloth banner from his jacket. As Gore was speaking, Katz started to unfold the banner and walked to the barrier. The banner measured approximately four feet by three feet and stated "Please Keep Animal Torture Out of Our National Parks." Katz intended to hang the banner over the fence so that Vice President Gore and the other speakers could read it.

According to Katz's deposition, before he could fully unfurl the banner, a military police officer "grabbed [him] from behind and somebody else tore the banner away." These individuals were Defendants Saucier and Steven Parker, an Army sergeant. Katz did not try to prevent them from taking the banner. The two military police officers then each took one of Katz's arms and "started sort of picking [Katz] up and kind of walking [him] out, kind of like very hurriedly, sort of like the bum's rush." They took Katz to a military van parked behind the seating area and "violently threw" him inside. As the military police officers "shoved" Katz into the vehicle, he was able "to kind of prevent" his head from smashing into the floor of the van. He "was able to stop the downward and the forward motion by just catching [himself] so that [he] didn't smash [himself]." With "a great deal of effort," he was barely able "to prevent [himself] from getting seriously hurt."

The military police officers never spoke to Katz. They closed the door to the van, leaving Katz alone in the vehicle for about twenty minutes. At some point, the military police officers placed another IDA member in the van, and they searched and handcuffed Katz and the other IDA member. They then drove Katz and the

other IDA member to a military police station. After being briefly detained, Katz was released and allowed to drive home. Katz was never informed of the basis for his detention or cited with any violation of any law or regulation.

PROCEDURAL HISTORY

Katz and IDA filed a lawsuit in the district court alleging multiple claims against the United States, a national parks official, and various military officials. Against Saucier, Katz alleged claims predicated upon violations of the First Amendment, by depriving Katz of his right to free speech, and the Fourth Amendment, by arresting Katz without probable cause and with excessive force. Katz asserted the same claims against Sergeant Parker, but at the time of this appeal Parker had not been served.

As to Katz's First Amendment-based claim, the district court granted summary judgment in favor Saucier and several of the military officials on the ground of qualified immunity. The district court determined that, "[i]n light of the transitional stage of the Presidio on September 24, 1994, . . . the [c]onstitutional rights of protestors at the base were not well settled on that date. [Thus], a reasonable military officer could have concluded that preventing protests at the base was [c]onstitutional." The district court also granted summary judgment in favor of Saucier on Katz's false arrest claim, holding that Saucier was entitled to qualified immunity. The district court, however, denied Saucier's motion for summary judgment on Katz's excessive force claim.

The district court described in detail the factual disputes between the parties concerning the amount of force used, the nature of the risk posed by Katz, and whether and to what degree Katz resisted arrest. The district court concluded that "[a] triable issue of fact exists as to whether [the] defendants employed excessive force in removing Katz from the crowd and placing him in the police van." On the issue of qualified immunity, the district court held that the law governing the use of force in an arrest was clearly established. Stating that "the qualified immunity inquiry is the same as the inquiry on the merits" in an excessive force claim, the district court concluded that "a question of fact [exists] regarding whether a reasonable officer could believe [Saucier's] use of force was lawful."[3]

Saucier timely filed this interlocutory appeal of the district court's order denying him qualified immunity.

DISCUSSION

I.

STANDARD OF REVIEW

We review de novo a denial of summary judgment on qualified immunity. *See Knox v. Southwest Airlines*, 124 F.3d 1103, 1105 (9th Cir. 1997).

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[3] Because of the lack of a link between the actions of Defendants General Glynn Mallory, Jr., and Major Corbin Lee and Saucier's use of force, the district court granted summary judgment in favor of those defendants on Katz's Fourth Amendment-based claims.

II.

JURISDICTION

We have jurisdiction under the collateral order doctrine to review an interlocutory appeal of the district court's order denying summary judgment on a qualified immunity defense. *See Armendariz v. Penman*, 75 F.3d 1311, 1316 (9th Cir. 1996) (*citing Mitchell v. Forsyth*, 472 U.S. 511, 528, 105 S. Ct. 2806, 86 L.Ed.2d 411 (1985)). The collateral order doctrine, however, "does not sanction review of a district court's order denying the defendant's motion for summary judgment on qualified immunity grounds when the basis for the defendant's motion is that the evidence in the pretrial record is insufficient to create a genuine issue of fact for trial." *Id.* at 1317 (citing *Johnson v. Jones*, 515 U.S. 304, 313-319, 115 S. Ct. 2151, 132 L.Ed.2d 238 (1995)). Thus, on summary judgment, our review is generally "limited to determining whether clearly established law existed at the time of the incident that [the defendant's] actions could have violated." *Watkins v. City of Oakland*, 145 F.3d 1087, 1091 (9th Cir. 1998). We also have jurisdiction, however, to review the question whether there is any genuine issue of material fact as to whether an officer's conduct "met the [qualified immunity] standard of 'objective legal reasonableness.'" *Behrens v. Pelletier*, 516 U.S. 299, 313, 116 S. Ct. 834, 133 L.Ed.2d 773 (1996); *see also Collins v. Jordan*, 110 F.3d 1363, 1370 (9th Cir. 1996) ("An appellate court [also] has jurisdiction to consider defendants' assertion that the dispute of fact is not *material*.").

III.

Qualified Immunity Analysis In An Excessive Force Case

Saucier argues that our en banc holding in *Hammer*, 932 F.2d at 850, conflicts with our later cases in which we have equated the reasonableness test for the defense of qualified immunity with the reasonableness test for the merits of an excessive force claim. We disagree.

"The doctrine of qualified immunity protects 'government officials performing discretionary functions . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Somers v. Thurman*, 109 F.3d 614, 616-17 (9th Cir.) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L.Ed.2d 396 (1982)), *cert. denied*, 522 U.S. 852, 118 S. Ct. 143, 139 L.Ed.2d 90 (1997). The qualified immunity analysis is the same for *Bivens* actions against federal officials as it is for claims against state officials under 42 U.S.C. § 1983. *See Harlow*, 457 U.S. at 818 n. 30, 102 S. Ct. 2727. "To determine whether an official is entitled to qualified immunity, we conduct a two-part analysis: (1) We consider whether the law governing the official's conduct was clearly established. If it was not clearly established, the official is entitled to immunity from suit. (2) If the law was clearly established, we proceed to ask if under that law, a reasonable official could have believed the conduct was lawful." *Somers*, 109 F.3d at 617 (citing *Act Up!/Portland v. Bagley*, 988 F.2d 868, 871 (9th Cir. 1993)).

Qualified immunity is a defense. In a civil rights action in which qualified immunity is asserted, the reasonableness of an officer's conduct comes into play under the second prong of that defense. In a civil rights action founded on the use of excessive force under the Fourth Amendment, the reasonableness of the officer's conduct also comes into play, not as an element of the officer's defense, but as an element of the plaintiff's case. The Supreme Court held in *Graham v. Connor*, 490 U.S. 386, 395, 109 S. Ct. 1865, 104 L.Ed.2d 443 (1989), that "*all* claims that law enforcement officers have used excessive force . . . in the course of an arrest . . . should be analyzed under the Fourth Amendment and its 'reasonableness' standard . . . ." The Court explained that this "'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the [officer's] actions are 'objectively reasonable' in light of the facts and circumstances confronting [him]." *Id.* at 397, 109 S. Ct. 1865.

The essence of the *Graham* reasonableness inquiry is a balancing of the "force which was applied . . . against the *need* for that force." *Liston v. County of Riverside*, 120 F.3d 965, 976 (9th Cir. 1997) (internal quotation marks and citations omitted). In evaluating whether the force used to effect a particular arrest is reasonable, a court must pay careful attention to the following non-exhaustive list of factors: "(1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and (3) whether the suspect actively resists detention or attempts to escape." *Id.* (citing *Graham*, 490 U.S. at 396, 109 S. Ct. 1865).

Both the second prong of the qualified immunity defense (whether a reasonable officer could have believed his conduct was lawful), and the merits of an excessive force claim focus on the objective reasonableness of the officer's conduct. To determine whether an officer is entitled to the defense of qualified immunity when the use of force is in issue, the question asked is whether a hypothetical officer reasonably could have believed that the amount of force used was reasonable. To resolve the merits of an excessive force claim, the question is whether a reasonable officer could have believed that the force used was necessary under the circumstances. *See Graham*, 490 U.S. at 397, 109 S. Ct. 1865. Because of this parity, we have repeatedly held that "the inquiry as to whether officers are entitled to qualified immunity for the use of excessive force is the same as the inquiry on the merits of the excessive force claim." *Alexander v. County of Los Angeles*, 64 F.3d 1315, 1322 (9th Cir. 1995); *accord Acosta v. City and County of San Francisco*, 83 F.3d 1143, 1147-48 (9th Cir.), *cert. denied*, 519 U.S. 1009, 117 S. Ct. 514, 136 L.Ed.2d 403 (1996); *Scott v. Henrich*, 39 F.3d 912, 914 (9th Cir. 1994), *cert. denied*, 515 U.S. 1159, 115 S. Ct. 2612, 132 L.Ed.2d 855 (1995); *Alexander v. City and County of San Francisco*, 29 F.3d 1355, 1367 (9th Cir. 1994), *cert. denied*, 513 U.S. 1083, 115 S.Ct. 735, 130 L.Ed.2d 638 (1995); *Palmer v. Sanderson*, 9 F.3d 1433, 1435-36 (9th Cir. 1993); *Morgan v. Woessner*, 997 F.2d 1244, 1259-60 (9th Cir.), *cert. dismissed*, 510 U.S. 1033, 114 S. Ct. 671, 126 L.Ed.2d 640 (1994); *Hopkins v. Andaya*, 958 F.2d 881, 885 n. 3 (9th Cir. 1992); *Curnow v. Ridgecrest Police*, 952 F.2d 321, 325 (9th Cir. 1991), *cert. denied*, 506 U.S. 972, 113 S. Ct. 460, 121 L.Ed.2d 369 (1992).

The majority of other circuits have taken similar positions. *See Bass v. Robinson*, 167 F.3d 1041, 1051 (6th Cir. 1999); *Thomas v. Roach*, 165 F.3d 137, 143 (2d Cir. 1999); *Frazell v. Flanigan*, 102 F.3d 877, 886-87 (7th Cir. 1996); *Scott v. District of Columbia*, 101 F.3d 748, 759 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1231, 117 S. Ct. 1824, 137 L.Ed.2d 1031 (1997); *Mick v. Brewer*, 76 F.3d 1127, 1135 n. 5 (10th Cir. 1996); *Rowland v. Perry*, 41 F.3d 167, 173 (4th Cir. 1994); *cf. Roy v. Inhabitants of the City of Lewiston*, 42 F.3d 691, 695 (1st Cir. 1994) ("In police misconduct cases, however, the Supreme Court has used the same 'objectively reasonable' standard in describing both the constitutional test of liability and the Court's own standard for qualified immunity." (citations omitted)). *But see, Snyder v. Trepagnier*, 142 F.3d 791, 800-01 (5th Cir. 1998) ("There is no inherent conflict between a finding of excessive force and a finding of qualified immunity."), *cert. granted*, —— U.S. ——, 119 S. Ct. 863, 142 L.Ed.2d 716 (including "[w]hether a jury finding that a constitutional violation incurred by use of excessive force in an arrest necessarily precludes a finding of qualified immunity, so as to make such dual findings irreconcilable"), *cert. dimissed*, —— U.S. ——, 119 S. Ct. 1493, 143 L.Ed.2d 575 (1999) (pursuant to agreement between the parties).

As the district court recognized, in an excessive force case, a material issue of fact as to whether an officer used excessive force precludes summary judgment on a qualified immunity defense. An officer cannot have an objectively reasonable belief that the force used was necessary (entitling the officer to qualified immunity) when no reasonable officer could have believed that the force used was necessary (establishing a Fourth

Amendment violation). *See Street v. Parham*, 929 F.2d 537, 540 (10th Cir. 1991). If genuine issues of material fact as to the amount of force used, or the circumstances that might justify the amount of force used, prevent a court from concluding as a matter of law that the force was objectively reasonable, then a material issue of fact necessarily exists as to whether an objectively reasonable officer could have believed the amount of force used was lawful.

We reject Saucier's assertion that our many and consistent panel opinions on this subject are in conflict with our en banc opinion in *Hammer*, 932 F.2d at 850. In *Hammer*, the plaintiff alleged that an arresting officer had used excessive force to obtain a blood sample from him after his arrest for drunken driving. *See id.* at 843-44. At the time of the arrest, prevailing Supreme Court authority expressly permitted the withdrawal of blood over the objection of the subject. *See id.* at 850 (citing *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L.Ed.2d 908 (1966) and *Breithaupt v. Abram*, 352 U.S. 432, 77 S. Ct. 408, 1 L.Ed.2d 448 (1957)). The constitutionality of the use of force to extract blood was judged by the "shock the conscience" standard, which standard the plaintiff Hammer conceded was not met. *See id.* We held that, although "*Graham* imposes a balancing test that can . . . result in force being found excessive even though it did not rise to the level that shocks the conscience[, r]easonable officers . . . cannot be required to have anticipated the ruling in *Graham*." *Id.* Thus, we concluded that the defendants were "immune from personal liability in damages for their actions in applying or authorizing the use of force that was unreasonable in all the circumstances but well below the level

that shocks the conscience." *Id.* It was in this context that we stated:

> [The plaintiff] suggested at oral argument that an officer who has used unreasonable force cannot, by definition, have acted reasonably. A similar contention was rejected, however, in [*Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034, 97 L.Ed.2d 523 (1987)]. Whether a search is "unreasonable" within the meaning of the Fourth Amendment is an entirely different question from whether an officer could have believed his actions lawful under the Fourth Amendment. [*See id.*] at 643-44, 107 S. Ct. 3034. To accept [the plaintiff's] contention would be to eliminate all possibility of immunity for violations of the Fourth Amendment, an unacceptable outcome. *See id.* at 643, 107 S. Ct. 3034.

Id.

Saucier contends this passage contradicts and invalidates our subsequent holdings that the "objective reasonableness" tests for excessive force and qualified immunity are the same. It does not. *Hammer* involved circumstances not at issue here or in the subsequent line of cases Saucier challenges. *Graham* articulated a new objective reasonableness test that was different from what had been the clearly-established "shock-the-conscience" test. The amount of force used in *Hammer* violated the Fourth Amendment because it was objectively unreasonable, but an objectively reasonable officer could have believed that his conduct did not "shock the conscience" and thus was in fact lawful under the legal test used at the time. Such an outcome is specifically contemplated by the qualified immunity test, par-

ticularly the first prong.[4] *See, e.g., Chew v. Gates*, 27 F.3d 1432, 1446-50 (9th Cir. 1994) (affirming qualified immunity because the training and use of police dogs did not contravene clearly established law).

Unlike the situation in *Hammer*, our subsequent line of cases which have equated the merits of the "objective reasonableness" inquiry in a use-of-force case with the "objective reasonableness" inquiry in a qualified immunity defense do not eliminate the availability of qualified immunity as a defense in excessive force cases. A defendant will always be entitled to qualified immunity when the law governing his or her conduct was not clearly established—the first prong of the qualified immunity defense.

As a fallback position, Saucier argues that even if the district court applied the correct legal test to his qualified immunity defense, the amount of force he used in arresting Katz was so minimal that it was *per se*

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[4] Most of the Supreme Court's qualified immunity discussion in *Anderson* focuses on the proper formulation of the "clearly established" prong. *See Anderson*, 483 U.S. at 639-41, 107 S. Ct. 3034; *cf. Harlow*, 457 U.S. at 818-19, 102 S. Ct. 2727 ("If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct."). Although in *Anderson* the Court rejected the argument that qualified immunity is never available in Fourth Amendment cases, the Court did not address the application of the second prong of the qualified immunity analysis, let alone its application in excessive force cases. *See Anderson*, 483 U.S. at 643-44, 107 S. Ct. 3034; *see also Graham*, 490 U.S. at 399 n. 12, 109 S. Ct. 1865 (expressly reserving the question whether qualified immunity is available in excessive force cases).

reasonable.[5] We disagree. The facts are in dispute. According to Katz, without warning or speaking to him, Saucier and Parker approached him from behind, grabbed his banner, dragged him about fifty feet, and tossed him into the back of a van so violently that he narrowly avoided serious injury. Taking these facts as true for the purpose of summary judgment, no reasonable officer could have believed that the alleged amount of force used to arrest Katz was necessary under the circumstances. *See Liston*, 120 F.3d at 976 ("[W]e must pay careful attention to (1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and (3) whether the suspect actively resists detention or attempts to escape."). Unfurling a banner at a public event does not appear to be a particularly severe crime. Katz was sixty years old and wearing a leg brace. There is no indication that he was armed or dangerous. From all that appears at this stage of the case, he did not pose an immediate threat to the safety of the officers or anyone else. Although Saucier disputes whether Katz resisted arrest, Katz says he did not.

In sum, taking the facts as asserted by Katz in the light most favorable to him, no reasonable officer could have believed that the amount of force used was lawful. *See, e.g., Sheth v. Webster*, 145 F.3d 1231, 1238 (11th Cir. 1998) (officer not entitled to qualified immunity for

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[5] The question of the reasonableness of force is usually a question of fact for the jury. "However, on summary judgment, the court may make a determination as to reasonableness when, viewing the evidence in the light most favorable to [the plaintiff], the evidence compels the conclusion that [the officer's] use of force was reasonable." *Hopkins*, 958 F.2d at 885.

pushing, handcuffing, and dragging plaintiff in absence of justification); *Alexis v. McDonald's Restaurants of Massachusetts, Inc.*, 67 F.3d 341, 353 (1st Cir. 1995) ("[W]e are not persuaded that the record evidence compelled the conclusion that the force with which [the defendant officer] effected the sudden, unannounced, violent seizure and removal of Alexis's person was objectively reasonable . . . ."). Saucier was not entitled to summary judgment as a matter of law.

CONCLUSION

The district court correctly relied on our long line of cases consistently holding that the reasonableness inquiry as to whether a defendant is entitled to the defense of qualified immunity in a claim of excessive force under the Fourth Amendment is the same as the reasonableness inquiry on the merits of such a claim. Genuine issues of material fact are in dispute as to whether Saucier used excessive force in effecting Katz's arrest. The district court did not err in denying Saucier's motion for summary judgment predicated on qualified immunity.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-94-3466 DLJ

ELLIOT M. KATZ AND IN DEFENSE OF ANIMALS,
PLAINTIFFS

v.

UNITED STATES, MAJOR CORBIN LEE,
SERGEANT STEVEN PARKER, PRIVATE DONALD
SAUCIER, GENERAL GLYNN C. MALLORY, JR., BRIAN
O'NEILL, AND DOES 1 THROUGH X, INCLUSIVE,
DEFENDANTS

[Filed: May 15, 1998]

ORDER

Now before the Court are defendant Saucier's and defendants Mallory and Lee's motions for summary judgment. Having considered the arguments of counsel, the papers submitted, the applicable law and the record in this case, the Court GRANTS IN PART and DENIES IN PART defendant Saucier's motion and GRANTS defendants Mallory and Lee's motion.

I. BACKGROUND

A. Factual Background and Procedural History

Plaintiffs are In Defense of Animals, an animal rights organization, and Elliot Katz, its president. Defendants are Major Corbin Lee, Commanding Officer for the Military Police in the Presidio; Lieutenant General Glynn C. Mallory, Jr., Commanding General of the Sixth United States Army; Sergeant Steven Parker, squad leader on duty September 24, 1994 in the Presidio; and Private First Class Donald Saucier, military police officer on duty September 24, 1994 in the Presidio.

By press release dated September 20, 1994 and other publicity, the National Park Service invited the public to attend base conversion celebration activities at the Presidio on September 24, 1994. *See* Exh. A attached to Plaintiffs' Supplemental Opposition filed Mar. 22, 1998. The objective of the event was to commemorate "the Presidio's historic transfer from military post to national park" on October 1, 1994. *Id.* Government officials, including Vice President Gore, gave speeches. Hundreds of people attended the event.

Plaintiffs claim to have suffered civil rights violations caused by defendants at the base conversion celebration. Plaintiffs filed their original complaint on September 29, 1994, seeking damages, declaratory relief and injunctive relief. They allege that plaintiff Katz was prohibited from displaying a banner expressing sentiments critical of the treatment of animals in medical research to be conducted at the Presidio's Letterman Hospital. They allege that Katz was sitting be-

hind a gate which blocked the public from the stage. They claim that as Vice President Gore began speaking about the Presidio becoming a "global learning center," Katz, without saying anything, removed a cloth banner from his jacket. The banner was approximately 4 feet by 3 feet and stated "Please Keep Animal Torture Out of Our National Parks." They allege that Katz intended to display the banner by hanging it over the fence so that it could be read by Vice President Gore and the other speakers.

Plaintiffs claim that before Katz could display the banner, a Military Police officer grabbed him from behind, ripped the banner out of his hands, forcibly grabbed him, and violently threw him into the police van. They allege that Katz was searched and handcuffed but never informed of the basis for his detention and never cited with violation of any law or regulation. Plaintiffs contend that they never received written notice of any restrictions on expressive activity on the Presidio during the September 24, 1994 event.

The Court has dealt with a number of dispositive motions in this case. Most recently, and relevant to the instant motion, the Court granted summary judgment in favor of defendants Mallory and Lee on plaintiffs' First Amendment claim. The Court found that defendants Mallory and Lee were entitled to qualified immunity because plaintiffs' First Amendment rights were not well-settled at the time of the base conversion celebration. The Court deferred ruling on defendants' motion for summary judgment with regard to the Fourth Amendment claim. Mallory and Lee's motion for summary judgment on the Fourth Amendment claim is now before the Court.

On October 3, 1997, defendant Saucier moved for summary judgment on the Fourth Amendment claim. Plaintiffs filed their opposition on October 22, 1997, and defendant Saucier replied on October 28, 1997. The matter was heard on November 12, 1997, at which time the Court granted the parties leave to file supplemental briefing. The Court took defendant Saucier's motion for summary judgment under submission on February 27, 1998.

B. Legal Standard

The Federal Rules of Civil Procedure provide for summary adjudication when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(e).

In a motion for summary judgment, "[i]f the party moving for summary judgment meets its initial burden of identifying for the court those portions of the materials on file that it believes demonstrate the absence of any genuine issues of material fact," the burden of production then shifts so that "the nonmoving party must set forth, by affidavit or as otherwise provided in Rule 56, '*specific facts* showing that there is a genuine issue for trial.'" *T.W. Elec. Service, Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)); *Kaiser Cement Corp. v. Fischbach & Moore, Inc.*, 793 F.2d 1100, 1103-04 (9th Cir.), *cert. denied*, 479 U.S. 949 (1986).

A moving party who will not have the burden of proof at trial need only point to the insufficiency of the other side's evidence, thereby shifting to the nonmoving party the burden of raising genuine issues of fact by substantial evidence. *T.W. Electric*, 809 F.2d at 630 *citing Celotex*, 477 U.S. at 323; *Kaiser Cement*, 793 F.2d at 1103-1104.

In judging evidence at the summary judgment stage, the Court does not make credibility determinations or weigh conflicting evidence, and draws all inferences in the light most favorable to the nonmoving party. *T.W. Electric*, 809 F.2d at 630-31 (citing *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)); *Ting v. United States*, 927 F.2d 1504, 1509 (9th Cir. 1991).

The evidence the parties present must be admissible. Fed. R. Civ. P. 56(e). Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment. *See Falls Riverway Realty, Inc. v. Niagara Falls*, 754 F.2d 49 (2nd Cir. 1985); *Thornhill Pub. Co., Inc. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979). Hearsay statements found in affidavits are inadmissible. *See, e.g., Fong v. American Airlines, Inc.*, 626 F.2d 759, 762-63 (9th Cir. 1980). The party who will have the burden of proof must persuade the Court that it will have sufficient admissible evidence to justify going to trial. The standard for judging a motion for summary judgment is the same standard used to judge a motion for a directed verdict: "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one

party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986).

II. ANALYSIS

Defendants Saucier, Mallory and Lee contend that they are entitled to summary judgment because they did not violate Katz's Fourth Amendment rights.

A. Probable Cause to Arrest

The Fourth Amendment prohibits an officer from making an arrest without probable cause. *Mackinny v. Nielsen*, 69 F.3d 1002, 1005 (9th Cir. 1995) (citing *United States v. Hoyos*, 892 F.2d 1387, 1392 (9th Cir. 1989), *cert. denied*, 498 U.S. 825 (1990)). Probable cause exists when the "facts and circumstances within the arresting officer's knowledge are sufficient to warrant a prudent person to believe that a suspect has committed, is committing, or is about to commit a crime." *Id.*

Defendants claim that there was probable cause to arrest Katz. Defendants claim that Military Police personnel had been briefed on the morning of the event and informed that demonstrations would not be allowed. Parker Depo. at 40. They refer to Katz's own statement that during the speeches, he removed the banner from inside his jacket and "stood up, opened the banner up, unfolded the banner, and walked to the barrier." Katz Decl. at 36:5-11. Katz states that he then placed the banner on top of the barrier so as to allow it to "fall down and open up so it would just be hanging from the barrier." *Id.* Defendants argue that they had probable cause to believe that plaintiff was about to engage in an unlawful demonstration when

they observed him unfurl the banner and approach the barricade.

Plaintiffs argue that defendants lacked probable cause to believe that a crime was taking place because the First Amendment protected Katz' demonstration. However, in its February 24, 1997 Order, this Court expressly found that the constitutional rights of protestors on the base were not well defined at the time of the base conversion celebration. The Court stated:

> In light of the transitional state of the Presidio on September 24, 1994, the Court finds that the Constitutional rights of protestors at the base were not well settled on that date. Because the rights of protestors at the Presidio were not well established on the date in question, a reasonable military officer could have concluded that preventing protests at the base was Constitutional.

February 24, 1997 Order at 10 (footnote omitted). If a reasonable officer could have concluded that protests on base were unlawful on the day in question, then the officers had probable cause to believe that Katz was about to commit a crime when he approached the barricade carrying a banner. Accordingly, the decision to apprehend Katz did not amount to a Fourth Amendment violation.

B. Use of Force

Regardless of whether Katz's arrest was supported by probable cause, defendants may have acted in violation of the Fourth Amendment if they used excessive force to effectuate the arrest. A free citizen's section 1983 claim that law enforcement officials used excessive

force in the course of seizing the person is analyzed under the Fourth Amendment's "objective reasonableness" standard. *Graham v. Connor*, 490 U.S. 386, 388 (1989). The question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. *Id.* at 397.

Following *Graham*, in deciding a claim of excessive force, the Ninth Circuit considers the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. *See Liston v. County of Riverside*, 120 F.3d 965, 976 (9th Cir. 1997); *Alexander v. City and County of San Francisco*, 29 F.3d 1355, 1366 (9th Cir. 1994), *cert. denied*, 513 U.S. 1083 (1995); *Hopkins v. Andaya*, 958 F.2d 881, 885 (9th Cir. 1991).

According to Katz, after he placed the banner over the barrier, "[s]omebody grabbed me from behind, and somebody else tore the banner away." Katz. Decl. 37:14-15. He explains the incident as follows:

> Basically, I just held the banner in place so that Vice President Gore could see it, as well as give it a chance to unfold itself, because it never really, I don't believe, totally unfolded. Before it unfolded—this thing happened really quick. So, I think it unfolded about half down, or something like that. And then I just held it in place while I think they had their arms around me, or one of them had their arms around me. ¶

Katz Depo. at 38:1-10. Katz was then removed from the crowd:

> . . . I think each one of them took an arm, and they sort of started sort of picking me up and kind of walking me out, kind of like very hurriedly, sort of like the bum's rush: Let's just get this guy out of here.

Katz Depo. at 38:11-15. Katz states that once he reached the van, he was "shoved" into the van:

> I managed to kind of prevent myself from—as it was happening, it was like flashing that I was—my head was going to smash down, or I was going to go full length into—with my head going into the end of the van, and I was able to stop the downward and the forward motion by just catching myself so that I didn't smash myself.

Katz Depo. at 41:17-23.

Defendants offer a markedly different description of the events in question. Officer Parker states that he approached Katz as Katz was reaching into his jacket. Parker Depo. at 42:25-26. Parker claims that he than put his "arms around [Katz], and [Katz] put both his arms onto the barricade. And I was trying to pull him up from the barricade, and he wasn't letting go." *Id.* at 42:26-43:4.

According to defendants, once the officers removed Katz from the barricade, Parker and Saucier "escorted him back approximately 50 yards" to the van stationed nearby. Parker Depo. at 46:24-26. Defendant Saucier states that plaintiff resisted going into the van "by sticking his legs up on the bumper and pushing away. So we had to use our heads putting him in the back of the vehicle." Saucier Depo. 18:14-17.

Defendants claim that the use of force was justified because at the time of the arrest, they were concerned for the safety of the public and for the speakers. Sergeant Parker asserts that he approached Katz as Katz began moving toward the barricade and putting his hand inside his jacket. Parker Depo. at 42:3-6, 25-26. Parker states that he was concerned for the safety of the persons attending the ceremony. He explains that he perceived it to be his duty to ensure "the safety of the Vice President and personnel there" and particularly "to ensure that if this individual was trying to do something, pull a gun out or anything like that, I was there to ensure that that did not happen." *Id.* at 43:11-16.

The evidence suggests that defendants overstate the risk of danger posed by Katz. At the outset, the Court notes that Parker's testimony directly conflicts with Katz's statement that he approached the barrier only *after* removing the banner from his jacket. *See* Katz Decl. at 36:5-11 (stating that he "stood up, opened the banner up, unfolded the banner, and walked to the barrier"). Defendants' own testimony further undercuts their characterization of the risk posed by Katz. Parker states that he had been warned of the possibility of demonstrations on the morning of the event. Parker Depo. at 40. Saucier's testimony suggests that defendants identified Katz in particular as a potential protestor. Saucier explained in his deposition, "Oh, I noticed [Katz] before we even—because he was pointed out as one of the potential, you know, activists. So we pretty much had a heads-up on him, sir." Saucier Depo. at 14. Saucier testified that Parker informed him "exactly who this person was" and that Parker identi-

fied Katz as "a possible activist" and "the person we need to keep on eye on." *Id.* at 14-15.

Moreover, the evidence now before the Court tends to contradict defendants' characterization of the physical threat posed by Katz. On the day of the event, Katz, a 60-year-old man, wore a brace on his leg because he had previously fractured his foot. Katz Depo. at 34:10-12. The brace extended from his foot up to a point just below his knee. *Id.* at 34:14-16. He was not wearing a shoe on the injured foot. *Id.* at 18-21. Finally, the Court notes Parker's statement that Katz did not overpower the officers at any time. Parker Depo. at 47:19-20. Based on this evidence, the Court finds that an issue of fact exists as to the nature of the risk presented by Katz.

The Court cannot conclude that the use of force was not excessive as a matter of law. The Court has reviewed the declarations and deposition testimony submitted by the parties, as well as a videotape of television news coverage of the events at the Presidio conversion ceremony. *See* Pls.' Exh. D attached to Pls.' Complaint. Viewed in a light most favorable to plaintiffs, the videotape shows two officers, on each side of Katz, removing him from the crowd and carrying or pulling him toward the van. Once they arrive at the van, the officers push Katz into the van. Given the nature of the crime at issue and the circumstances surrounding the incident, the Court cannot conclude that the use of force was reasonable as a matter of law. A triable issue of act exists as to whether defendants employed excessive force in removing Katz from the crowd and placing him in the police van.

C. Qualified Immunity

Defendants contend that they cannot be held liable for a violation of Katz's Fourth Amendment rights because they are entitled to qualified immunity. Under the doctrine of qualified immunity, officers "performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable [police officer] would have known." *Harlow v. Fitzgerald*, 457 U.S. 818 (1982). Even in the face of a clearly established constitutional right, police officers are entitled to qualified immunity if a reasonable police officer could have believed that the conduct involved was legal. *See Anderson v. Creighton*, 483 U.S. 635, 639 (1987). Thus the availability of qualified immunity depends upon the "'objective legal reasonableness' of the action . . . in light of the legal rules that were 'clearly established' at the time it was taken." *Id.* (quoting *Harlow*, 457 U.S. at 818-19).

The Ninth Circuit has established a two-prong analysis to determine whether qualified immunity is appropriate. First, the district court must determine whether the law governing the official's challenged conduct was clearly established at the time the challenged conduct occurred. The second step then asks whether, under the clearly established law, a reasonable officer could have believed the conduct was lawful. *Liston v. County of Riverside*, 120 F.3d 965, 975 (9th Cir. 1997); *Mendoza v. Block*, 27 F.3d 1357, 1360 (9th Cir. 1994); *Act Up!/Portland v. Bagley*, 988 F.2d 868, 871 (9th Cir. 1993).

1. Clearly Established

The Court must first decide whether defendants' acted in violation of clearly established law governing plaintiffs' constitutional rights. For qualified immunity purposes, "[t]he contours of the right must be sufficiently clear that [at the time the allegedly unlawful action is taken] a reasonable officer would understand that what he is doing would violate the law." *Mendoza*, 27 F.3d at 1361 (citing *Anderson*, 483 U.S. at 640). It is clearly established that the use of excessive force in an arrest violates the arrestee's Fourth Amendment right to be free from an unreasonable seizure.[1] *Chew v. Gates*, 27 F.3d 1432, 1457 (9th Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995), (citing *White v. Pierce County*, 797 F.2d 812, 816 (9th Cir. 1986)).

2. Reasonable Officer

The next step is to determine whether, under the clearly established law, a reasonable officer could have believed that defendants acted lawfully with regard to the degree of force used to remove Katz from the crowd and place him inside the van. *See Liston*, 120 F.3d at 975; *Mendoza*, 27 F.3d at 1360; *Act Up!*, 988 F.2d at 871.

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[1] Plaintiffs contend that the relevant question is whether the defendants acted in violation of clearly established law governing plaintiffs' First Amendment rights. The Court rejects this approach for two reasons. First, the Court has already concluded that the law regarding the First Amendment rights of protestors was not clearly established on the day in question. Moreover, whether defendants are entitled to qualified immunity on the excessive force claim does not depend on whether the First Amendment rights of the protestors were well settled. To the contrary, the issue is whether the law regarding the use of force is clearly established.

In the Fourth Amendment context, the qualified immunity inquiry is the same as the inquiry made on the merits. *Hopkins*, 958 F.2d at 885 n.3. The Court must consider whether the totality of the circumstances justified the particular type of seizure. *See Curnow v. Ridgecrest Police*, 952 F.2d 321, 325 (9th Cir. 1991). As recited above, the Court finds a question of fact regarding whether a reasonable officer could believe defendant's use of force was lawful. *See infra* Section IIB. Defendants are therefore not entitled to summary judgment on the basis of qualified immunity.

D. The Participation of Defendants Mallory and Lee

Defendants Mallory and Lee contend that they are entitled to summary judgment on the Fourth Amendment claim because there is no evidence that either defendant participated in arresting Katz. A supervisor may be liable under section 1983 if (1) he was personally involved in the constitutional deprivation, or (2) there is a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation. *Mackinney v. Nielsen*, 69 F.3d 1002, 1008 (9th Cir. 1995); *see also Harris v. Roderick*, 126 F.3d 1189, 1204 (9th Cir. 1997) (citing *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989)).

Defendant Mallory asserts that he played no role in the seizure of Katz. Mallory explains:

> I did not issue prior to the September 24, 1994 ceremony any general orders or guidance as to how potential protestors should be handled, nor was I consulted as to how the military police or secret service agents intended to respond to protest activity.

> I did not participate in any order to apprehend Mr. Katz.

Mallory Decl. at ¶ 5. Plaintiffs concede that there is little evidence of defendant Mallory's personal involvement in the events at issue. They state that "there is limited evidence that [General Mallory] personally participated in, or set off a chain of actions leading to the use of excessive force . . . " Pls.' Supp. Opp. at 10, n.5. In fact, plaintiffs offer no evidence to connect Mallory to the force used to detain Katz. In light of the absence of any facts to suggest that defendant Mallory was involved in the events in question, he cannot be held liable under section 1983 in this case. Defendant Mallory is therefore entitled to summary judgment on plaintiff's Fourth Amendment claim.[2]

Defendant Lee also seeks summary judgment on the theory that he played no role in the events at issue in this suit. He states that he was not present at the apprehension of plaintiff. At the time of the detention, Lee contends, he was in the "command cell" that had been set up on the Presidio to coordinate security for the event. Lee insists that he was not involved in the detention of Katz:

> Neither Sergeant Parker nor Private First Class Saucier sought instruction from me as to whether

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[2] Plaintiffs contend that Mallory should remain in the case "because he caused arrests in violation of the [F]irst [A]mendment to be made." Pls.' Supp. Opp. at 10, n.5. In its prior order, the Court granted summary judgment on the First Amendment claim in Mallory's favor on the basis of qualified immunity. *See* Order dated February 27, 1997. As a result, there is no reason for Mallory to remain in this case.

> to apprehend Mr. Katz, nor did I order them at any time to apprehend Mr. Katz.

Lee Decl. ¶ 5.

In contrast, plaintiffs contend Lee played a "direct role" and "set in motion a series of acts by others that brought about the excessive force applied" to plaintiff Katz. Pls.' Supp. at 8. The causal connection required to establish liability of a supervisor may be established by showing that the supervisor "set[] in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury." *McRorie v. Shimoda*, 795 F.2d 780, 783 (9th Cir. 1986) (citing *Johnson v. Duffy*, 588 F.2d 740, 743-44 (9th Cir. 1978)).

Plaintiffs direct the Court's attention to evidence in the record that Lee instructed his subordinates on the morning of the base conversion celebration. Parker testified that he understood Lee to be responsible for the overall planning of the security for the event. Parker Depo. at 40. Similarly, plaintiffs rely on Saucier's testimony that he was following Lee's orders at the time he apprehended Katz. Saucier testified that the officers "knew exactly what we were supposed to do" because Lee "told us exactly how to handle the situation." Saucier Depo. at 26:10-14, 21-22. Plaintiffs have not, however, established the content of these instructions. There is no evidentiary basis to support plaintiffs' assertion that Lee's directions on the morning of the base conversion ceremony caused the alleged constitutional deprivation.

Plaintiffs also attempt to establish Lee's liability on the basis of his testimony reviewing the officers' ac-

tions. Lee testified at his deposition that he reviewed and approved of the officers' actions on the day in question:

> Q. And is it accurate that you talked to them afterwards and told them that they had done exactly what they were supposed to do an in a professional manner?
>
> A. Yes. And it was my standard operating procedure, that after any major event, I would conduct an after-action review with my military policemen and my soldiers, and we would cover the events that had transpired. [¶] And, yes, I felt they did an extremely good job and they were very professional and courteous in dealing with everyone in the general public.

Id. at 46:4-17. Lee's after-the-fact statements expressing approval of his subordinates' actions are insufficient to establish the requisite causal link to support the extension of liability in this case.

Plaintiffs also argue that Lee should be held liable for the unconstitutional actions of his staff because he was responsible for the placement of the vans near the site of the ceremony. Lee gave the following testimony at his deposition:

> Q. So it was understood from your orders to people there, that if someone was taken into custody at the site they were to be put into the van . . . ?
>
> A. That was one of the possible purposes that we could use that vehicle for. We had vehicles prepositioned in numerous areas.

Lee Depo. at 38:5-12. The Court rejects plaintiffs' contention that Lee's decision regarding the placement of the vans, and the possible use of those vans to detain individuals, caused the alleged violation of plaintiff's constitutional rights. Even assuming that Lee directed the use of the vans to detain individuals, nothing in the record supports the conclusion Lee *caused* the officers to employ excessive force in apprehending detainees.

Plaintiffs have proffered no evidence to suggest that Lee knew or should have known that he acted in a way that would cause others to violate Katz's Fourth Amendment rights. *See McRorie*, 795 F.2d at 783. As a result, plaintiffs have failed to establish a direct causal link between Lee's directions and the alleged constitutional violation. Lee therefore cannot be held liable under section 1983 for the acts of his subordinates.

III. CONCLUSION

For the reasons stated above, the Court hereby GRANTS IN PART and DENIES IN PART defendant Saucier's motion for summary judgment and GRANTS defendants Mallory and Lee's motion for summary judgment.

IT IS SO ORDERED.

Dated: May 15, 1998

/s/ D. LOWELL JENSEN
D. LOWELL JENSEN
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-94-3466 DLJ

ELLIOT M. KATZ AND IN DEFENSE OF ANIMALS, PLAINTIFFS

v.

UNITED STATES, MAJOR CORBIN LEE, SERGEANT STEVEN PARKER, PRIVATE DONALD SAUCIER, GENERAL GLYNN C. MALLORY, DEFENDANTS

[Filed: Feb. 24, 1997]

ORDER

On February 5, 1997, the Court heard arguments on defendant Mallory and defendant Lee's motion for summary judgment. J. Kirk Boyd and David H. Williams appeared on behalf of plaintiffs; Elliot M. Katz and R. Joseph Sher appeared on behalf of defendants Major Lee and General Mallory. Having considered the arguments of counsel, the papers submitted, the applicable law, and the record in this case, the Court hereby GRANTS in part and DEFERS in part defendants' motion for summary judgment.

I. BACKGROUND

A. Factual Background and Procedural History

Plaintiffs are In Defense of Animals, an animal rights organization, and Elliot Katz, its 60-year-old president. Defendants are Major Corbin Lee, Commanding Officer for the Military Police in the Presidio; Lieutenant General Glynn C. Mallory, Jr., Commanding General of the Sixth United States Army; Sergeant Steven Parker, squad leader on duty September 24, 1994 in the Presidio; and Private First Class Donald Saucier, military police officer on duty September 24, 1994 in the Presidio.[1]

Plaintiffs filed their original complaint on September 29, 1994, seeking monetary damages as well as declaratory and injunctive relief. Plaintiffs allege that defendants violated their civil rights on September 24, 1994 while Katz was attending a public gathering at the San Francisco Presidio. Specifically, Katz alleges that on September 24, 1994 he was prohibited from placing a protest banner on a gate in front of the stage where Vice President Gore and others were speaking. Plaintiff Katz alleges that he was taken from the crowd, through the use of unnecessary and excessive force, and placed in a police van before ultimately being released without having charges filed against him.

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[1] Brian O'Neill, Superintendent of the Golden Gate National Recreation Area is also a defendant in this complaint. However, the complaint against Superintendent O'Neill arises from activities at the Presidio after it became a National Recreation Area and is therefore not relevant to the instant motion.

Vice President Gore's speech was part of base conversion celebration activities at the Presidio. By press release dated September 20, 1994 and other publicity, the National Park Service invited the public to attend an event to be held at the Presidio on September 24, 1994 "commemorating the Presidio's historic transfer from military post to national park" on October 1, 1994. Hundreds of people attended the event. Plaintiff Katz alleges that the banner was confiscated from him by defendants in order to prevent him and his organization from expressing sentiments critical of the treatment of animals in medical research to be conducted at the Presidio's Letterman Hospital.

Katz was sitting in the front of the crowd behind a gate which blocked the public from the stage. He alleges that as Vice President Gore began speaking about the Presidio becoming a "global learning center," Katz, without saying anything, removed a cloth banner approximately 4 feet by 3 feet which stated "Please Keep Animal Torture Out of Our National Parks" with the intent of displaying the banner by hanging it over the fence so that it could be read by Vice President Gore and the other speakers. Katz claims that before he could do so, a Military Police officer grabbed him from behind, ripped the banner out of his hands, grabbed him, and violently threw him into the police van. He was searched and handcuffed but never informed of the basis for his detention or cited with violation of any law or regulation. Katz alleges that he never received written notice of any restrictions on expressive activity at the Presidio during the September 24, 1994 event.

On February 15, 1995 the Court dismissed plaintiffs' damage claims against the United States and ordered

plaintiffs to file an amended complaint clarifying defendant Lee's role in the incident.

On March 22, 1995, plaintiffs filed a First Amended Complaint, which alleged additional facts relating to defendant Lee and named Lieutenant General Glynn Mallory, Sergeant Steven Parker, and Private First Class Donald Saucier as additional defendants.[2] Defendant Parker had not been served and is not before this Court. Defendants Mallory and Lee now move the Court for summary judgment on the grounds that 1) they are entitled to qualified immunity on the First Amendment cause of action; 2) they are not liable for the actions of the arresting officers; and 3) no First Amendment violation occurred.

B. Legal Standard

The Federal Rules of Civil Procedure provide for summary adjudication when "the pleading, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(e).

In a motion for summary judgment, "[i]f the party moving for summary judgment meets its initial burden of identifying for the court those portions of the materials on file that it believes demonstrate the absence of any genuine issues of material fact," the burden of production then shifts so that "the nonmoving party

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[2] Plaintiffs inadvertently named the United States as a defendant in their amended complaint. They acknowledge that the United States has been dismissed from this case.

must set forth, by affidavit or as otherwise provided in Rule 56, '*specific facts* showing that there is a genuine issue for trial.'" *T.W. Elec. Service, Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (citing *Celotex Corp. v. Catrett*, 477 U.S . 317 (1986)); *Kaiser Cement Corp. v. Fischbach & Moore, Inc.*, 793 F.2d 1100, 1103-04 (9th Cir.), *cert. denied*, 479 U.S. 949 (1986).

A moving party who will not have the burden of proof at trial need only point to the insufficiency of the other side's evidence, thereby shifting to the non-moving party the burden of raising genuine issues of fact by substantial evidence. *T.W. Electric*, 809 F.2d at 630 *citing Celotex*, 477 U.S. at 323; *Kaiser Cement*, 793 F.2d at 1103-04.

In judging evidence at the summary judgment stage, the Court does not make credibility determinations or weigh conflicting evidence, and draws all inferences in the light most favorable to the nonmoving party. *T.W. Electric*, 809 F.2d at 630-31 (citing *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)); *Ting v. United States*, 927 F.2d 1504, 1509 (9th Cir. 1991).

The evidence the parties present must be admissible. Fed. R. Civ. P. 56(e). Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment. *See Falls Riverway Realty, Inc. v. Niagara Falls*, 754 F.2d 49 (2nd Cir. 1985); *Thornhill Pub. Co., Inc. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979). Hearsay statements found in affidavits are inadmissible. *See, e.g., Fong v. American Airlines, Inc.*, 626

F.2d 759, 762-63 (9th Cir. 1980). The party who will have the burden of proof must persuade the Court that it will have sufficient admissible evidence to justify going to trial. The standard for judging a motion for summary judgment is the same standard used to judge a motion for a directed verdict: "Whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986).

II. ARGUMENTS

A. Liability of Mallory and Lee

The first question presented is whether defendants Mallory and Lee can be held liable for the alleged violation of Katz's First and Fourth Amendment rights. Defendants argue that they cannot be held liable on the First Amendment cause of action because they are entitled to qualified immunity from liability and that they cannot be held liable on either cause of action because they were not responsible for the arresting officers' conduct.

1. Immunity of Mallory and Lee

Under the doctrine of qualified immunity, officers "performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable [police officer] would have known." *Harlow v. Fitzgerald*, 102 S. Ct. 2727, 2738 (1982). However, even in the face of a clearly established constitutional right, police officers are entitled to qualified immunity if a reasonable police

officer could have believed that the conduct involved was legal. *Anderson v. Creighton*, 107 S. Ct. 3034, 3038-39 (1987). Thus the availability of qualified immunity depends upon the "'objective legal reasonableness' of the action . . . in light of the legal rules that were 'clearly established' at the time it was taken." *Anderson*, 107 S. Ct. at 3038 (1987) (quoting *Harlow*, 102 S. Ct. at 2738-39).

The Ninth Circuit has described the proper analysis for determining whether qualified immunity is appropriate:

> First, the district court must determine whether the law governing the official's challenged conduct was clearly established at the time the challenged conduct occurred. The second step then asks whether, under the clearly established law, a reasonable officer could have believed the conduct was lawful. This is a test of the 'objective reasonableness' of the defendant's actions."

Mendoza v. Block, 27 F.3d 1357, 1360 (9th Cir. 1994) (citations omitted).

1. Established law at the Time of the Challenged Conduct

a. Free Speech Fora

In *Perry Educational Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983), the Supreme Court recognized three distinct fora in First Amendment analysis: the "traditional" or "quintessential" public forum, the "designated" public forum, and the "non-public" forum.

The traditional public forum consists of places such as streets or parks which "have immemorially been held in trust for the use of the public and, time out of mind, have been used or [*sic*] purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Perry*, 460 U.S. at 45.

The designated public forum is a public place which the State has opened to the public for the purpose of expressive activity. *Perry*, 460 U.S. 37, 45 (1983). Intent is required to create a designated public forum: "The government does not create a public forum by inaction or by permitting limited discourse, but only by *intentionally* opening a nontraditional forum for public discourse." *Cornelius*, 473 U.S. 788, 802 (1985).

A nonpublic forum is "[p]ublic property which is not by tradition or designation a forum for public communication." *Perry*, 460 U.S. at 46.

b. Regulations Permissible in Each Forum

If a facility is a traditional or designated public forum, the government may establish reasonable "time, place, and manner" restrictions on speech, but such restrictions must be (1) content-neutral;[3] (2) narrowly-tailored to further an important government interest; and (3) leave open ample alternative means of communication. *Perry*, 460 U.S. at 45; *Ward v. Rock Against Racism*, 109 S. Ct. 2746, 2753 (1989) (citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

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[3] If the regulations are content-based, they are subject to strict scrutiny and presumptively invalid. *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992)

If a facility is a nonpublic forum, the government has a lesser burden, but must nonetheless show that the restrictions on First Amendment activity are reasonable and viewpoint-neutral. *Perry*, 460 U.S. at 46.

c. The Status of the Presidio

From the foregoing, it appears clear that the status of defendant's rights depends critically on whether the Presidio was a designed public forum or a non-public forum on the date in question. Generally, military bases are not traditional public fora. "A military base . . . is ordinarily not a public forum for First Amendment purposes even if it is open to the public." *United States v. Albertini*, 472 U.S. 675, 684 (1985). However, the Presidio, particularly on the day in question, was not a typical military base. As the late Judge Peckham wrote of the Presidio, "thousands of tourists visit the Presidio each month to inspect Fort Point, an historical monument, or to enjoy the open spaces and greenery the Presidio grounds provide." *CCCO-Western Region v. Fellows*, 359 F.Supp. 644 (N.D.Cal. 1972).

While the public nature of the Presidio might not have sufficed to convert it into a designated public forum, the Presidio's invitation to the public on the day in question might well have done so. In a press release, the Golden Gate National Recreation Area stated that

> The public is invited to attend a special presentation by Vice President Al Gore at 10:00 a.m. on Saturday, September 24 at Pershing Square on the main post of the Presidio, San Francisco. The address will begin a week of activities commemorating the Presidio's historic transfer from military post to national park.

> The Vice President will speak about this one-of-a-kind base conversation and is expected to announce several new environmental initiatives. Other dignitaries scheduled to speak are Secretary of the Interior Bruce Babbitt, Senator Dianne Feinstein and Congresswoman Nancy Pelosi.

Thus, not only was the public expressly invited to the base, it was asked to participate in the process of moving the Presidio from military to civilian control. The conversion of the Presidio to a civilian park was a controversial development, and the Park's future was a matter of public concern, as was evidenced both by Dr. Katz's protest and by the presence of a number of prominent politicians at the event.

In light of the transitional state of the Presidio on September 24, 1994, the Court finds that the Constitutional rights of protestors at the base were not well settled on that date.[4] Because the rights of protestors at the Presidio were not well established on the date in question, a reasonable military officer could have concluded that preventing protests at the base was Constitutional. Therefore, the defendants are entitled to qualified immunity for the alleged deprivation of plaintiffs' First Amendment rights.

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[4] In reaching this conclusion the Court expresses no opinion on the merits of plaintiff's First Amendment complaint. For the reasons discussed in Section II.B., *infra*, a decision on this question is not now required.

2. Responsibility of Mallory and Lee

a. Connection to the Arrest

Generally, government supervisors are not subject to vicarious liability, but are liable only for their own conduct. *See, e.g., Monell v. Department of Social Services*, 436 U.S. 658, 694 n. 58. However, supervisors may be liable for failing to adequately train and/or supervise those under their control if it can be shown that the supervisors acted with "deliberate indifference" or "gross negligence." *See Bergquist v. County of Cochise*, 806 F.2d 1364, 1370 (9th Cir. 1986). In *Bergquist*, the court reaffirmed that "the required causal connection between supervisor conduct and the deprivation of a constitutional right is established either by direct personal participation or by setting in motion a 'series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury.'" *Id.* (quoting *Johnson v. Duffy*, 588 F.2d 740, 743-44 (9th Cir. 1978)). However, in a footnote the Court pointed out that a plan or policy on the part of supervisors "cannot be proved through reference to a single unconstitutional activity unless 'proof of the incident includes proof that it was caused by an existing unconstitutional . . . policy.'" *Id.* at 1370, n.9 (quoting *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985)).

Here, the proof of a link between the arrest of Katz and the defendants consists of declarations by Lee and Mallory and a policy letter allegedly circulated by Mallory. The policy letter, dated May 4, 1994 (more than four months before the arrest of Dr. Katz) states in full:

> 1. Picketing, demonstrating, sit-ins, protest marches, political speeches and other acts of public persuasion (to include circulation of petitions for signature, distribution of political handbills, flyers, signs and carry placards) are prohibited by Army regulation and will not be conducted on the Presidio of San Francisco without permission.
>
> 2. No one shall enter or remain on this post for any of the above purposes and such entry will constitute a violation of Title 18 USC Sec. 1382, which provides in part that: "Whoever within the jurisdiction of the United States, goes upon any military . . . reservation, post, fort arsenal, yard, station for any purpose prohibited by law or lawful regulation . . . shall be fined not more than $500 or imprisoned not more than six months, or both."
>
> 3. You are hereby warned that violaters [sic] will be issued a citation to appear before the United States Magistrate. Application for permission to demonstrate may be made through the Command Executive Assistant.

Exhibit B to Plaintiffs' Opposition. A jury could reasonably conclude that Mallory's circulation of the base policy letter was an act which Mallory knew or should have known would lead to the violation of plaintiff Katz's First Amendment rights. This policy letter is thus sufficient to create a triable issue of fact as to Mallory's role in the alleged suppression of Dr. Katz's speech.[5] It does not, however, tie Mallory to the Fourth

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[5] Given the Court's conclusion that General Mallory is entitled to qualified immunity on the First Amendment claim, however, the conclusion that he can be tied to the incident is largely irrelevant.

Amendment violation, as the letter states that violators of the policy would be issued a citation, not arrested.

Plaintiffs also seek to rely on the affidavits of Lee and Mallory in which both men express the opinion that First Amendment activity was not permitted at the Presidio. It is not clear exactly how the subjective beliefs of Lee and Mallory led to the arrest of Dr. Katz, as there is no evidence that this belief was communicated to others. Plaintiffs further argue that "it is simply not believable that Private Saucier or Sergeant Parker issued the order to ban all first amendment activity on September 24, 1994." Opposition at 8: 11-12. This is exactly the sort of proof, the use of a single incident to show the existence of an unconstitutional policy, that was expressly prohibited in *Bergquist*.

There is thus nothing, other than Lee's position as commanding officer of the military police at the Presidio and his view on the Constitutionality of protests within the Presidio, to suggest that he participated in a plan or policy to deprive plaintiff Katz of his Constitutional rights.[6] Therefore, although the policy letter

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[6] In its opposition to defendants' motion to dismiss, incorporated by reference into its current opposition, plaintiff argues that Judge Armstrong's decision in *Veterans' Speakers Alliance v. Fowler*, C-91-4459 SBA is "on all fours" with the current suit. This interpretation of *Veterans' Speakers Alliance* is faulty. In that case, the court found that "defendant Fowler directly participated in the unlawful arrest of plaintiff by actually ordering their arrest at the scene and that defendant Harrison personally participated in the wrongful conduct by issuing the bar letters to plaintiffs." In contrast, here, the plaintiffs are wholly unable to make a showing of direct involvement by Lee and Mallory in the alleged Fourth Amendment violations.

creates a triable issue of fact with regards to Mallory's ties to the suppression of Dr. Katz's speech, there does not appear to be any evidence sufficient to tie either man to the arrest.

b. Rule 56(f)

Plaintiffs argue that if the Court finds that the causal link between these defendants and the arrest of Dr. Katz is not a triable issue, that the Court defer ruling on defendants' motion pursuant to rule 56(f). Rule 56(f) states that when a party opposing a motion for summary judgment has demonstrated

> that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Here, plaintiffs' attorney states by way of affidavit that he has been unable to depose the arresting officers because they have been stationed overseas during the pendency of this action. Counsel argues that the testimony of the men who made the arrest is instrumental in establishing whether Mallory and Lee played a role in the arrest and that plaintiffs cannot defend a motion for summary judgment without the opportunity to elicit this information.

Defendants oppose plaintiffs' Rule 56(f) argument on two grounds. First, they argue that plaintiffs have not been diligent in seeking discovery, and therefore cannot take refuge in Rule 56(f). *See, e.g., Qualls v. Blue Cross of California*, 22 F.3d 839, 844 (1994) ("We will only find

that the district court abused its discretion if the movant diligently pursued its *previous* discovery opportunities, and if the movant can show how allowing *additional* discovery would have precluded summary judgment.") (emphasis in the original). Defendants maintain that plaintiffs' counsel has not attempted to depose any of the other relevant parties including defendants Lee, Mallory, or O'Neil. Furthermore, defendants maintain that Private Saucier has been stationed at West Point since Mid-December of 1996, and yet plaintiffs have made no attempt to depose him.[7] Plaintiffs' counsel answers that he has only recently learned that Private Saucier has returned to the United States. Furthermore, counsel contends that it makes no sense to take any depositions until those individuals who actually made the arrests have been deposed.

Second, defendants argue that plaintiffs have failed to demonstrate what evidence they expect to uncover and how this evidence will be relevant to the liability of Mallory and Lee. This objection is without merit. Plaintiffs clearly wish to interview the arresting officers in order to determine whether they had been instructed by Mallory and Lee to arrest any demonstrators at the Presidio on the day in question. Such evidence would directly rebut the claim by Mallory and Lee that they did not participate in the arrest of Dr. Katz, and is thus highly material.

The Court concludes that there is merit to the plaintiffs' Rule 56(f) motion. The testimony of Parker and Saucier is directly relevant to the question of

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[7] Sergeant Parker has still not been served in this action and is currently stationed in Germany.

Mallory and Lee's liability on the Fourth Amendment cause of action. Therefore, the Court will defer ruling on defendants' motion for summary judgment on the Fourth Amendment cause of action in order to permit plaintiffs to conduct additional discovery. Plaintiffs shall have sixty days from the issuance of this order to question Private Saucier and Sergeant Parker regarding the role of defendants Mallory and Lee in the arrest of Katz. The Court reminds counsel that such questioning need not necessarily be done by way of deposition, and that the plaintiffs may attempt to interview the relevant parties and provide their testimony by way of declaration.

Along with their additions to the factual record the plaintiffs may also file a supplemental memorandum in opposition to defendants' motion for summary judgment. This memorandum shall not exceed ten pages in length. No later than seven days after the plaintiffs file their additional papers, the defendants may file a supplemental reply, again not to exceed ten pages in length. The motion will then be under submission. No further hearing shall be held.

B. First Amendment Violation

Defendants argue that they are entitled to summary judgment on the issue of liability because the facts indicate that, as a matter of law, plaintiffs' First Amendment rights were not violated. The Court considered this issue in defendants' motion to dismiss but concluded that the record was insufficiently developed to analyze the issue.[8] The issue has now been fully

[8] Plaintiffs inexplicably misread the Court's October 3, 1995 order as deciding that a First Amendment violation occurred. The

briefed and supported by affidavits and exhibits. There do not appear to be any factual issues in dispute, and the issue of liability appears to come down to whether or not the Presidio was a public forum on the date in question.[9]

However, the Court finds that it need not decide whether or not there was a First Amendment violation in this case. Because the Court has already decided that defendants Mallory and Lee are entitled to qualified immunity on the alleged First Amendment violations, defendants' motion for summary judgment on the merits of those allegations is rendered moot.

III. CONCLUSION

For the reasons specified above, the Court orders the following:

1) Defendants' motion for summary judgment on the First Amendment cause of action on the basis of qualified immunity is hereby GRANTED, as the First Amendment rights of the plaintiffs were not well-settled on the date in question.

2) Pursuant to F.R.Civ.P. 56(f), the Court DEFERS ruling on defendants' motion for sum-

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Court was quite clear in stating that it did not have sufficient information before it to rule on the Constitutionality of the officers' conduct. Thus, plaintiffs' argument that defendants' motion for summary judgment is barred by the Law of the Case doctrine is rejected.

[9] Again, the plaintiffs badly misread prior proceedings on this question. Plaintiffs maintain that the settlement agreement entered into in *Veterans Speakers Alliance, et al. v. Fowler, et al.*, C 91 4459 SBA conclusively establishes that the Presidio is a public forum. In fact it does nothing of the sort. The stipulation agreed to by the parties in that case simply stated that in some circumstances military bases can become public fora.

mary judgment on the Fourth Amendment Cause of Action pending addition [sic] submissions by the parties.

3) Finally, the Court does not reach the merits of the defendants' motion for summary judgment on the First Amendment cause of action.

IT IS SO ORDERED.

Dated: February 24, 1997

/s/ D. LOWELL JENSEN
D. LOWELL JENSEN
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-94-3466 DLJ

ELLIOT M. KATZ AND IN DEFENSE OF ANIMALS,
PLAINTIFFS,

v.

THE UNITED STATES OF AMERICA, ET AL.,
DEFENDANTS

[Filed: June 27, 1996]

ORDER

On May 8, 1996, the Court heard arguments on plaintiffs' motion for declaratory relief and partial summary judgment. J. Kirk Boyd of Boyd, Huffman, Williams & Urla appeared on behalf of plaintiffs. R. Joseph Sher of the Department of Justice appeared on behalf of defendants. Having considered the arguments of counsel, the papers submitted, the applicable law, and the record in this case, the Court hereby DENIES plaintiffs' motion.

I. BACKGROUND

A. Procedural History

Plaintiffs are In Defense of Animals, an animal rights organization, and Elliot Katz, its 60-year-old president. Defendants are the United States of America; Major Corbin Lee, Commanding Officer for the Military Police in the Presidio; Lieutenant General Glynn C. Mallory, Jr., Command General of the Sixth United States Army; Sergeant Steven Parker, squad leader on duty September 24, 1994 in the Presidio; Private First Class Donald Saucier, military police officer on duty September 24, 1994 in the Presidio; and Brian O'Neill, Superintendent of the Golden Gate National Recreation Area.

Plaintiffs filed their original complaint on September 29, 1994, seeking damages, declaratory relief, and injunctive relief. Plaintiffs claim that defendants violated their civil rights on September 24, 1994 during a public gathering at the San Francisco Presidio. Specifically, plaintiff Katz alleges that on September 24, 1994, he was prohibited from placing a protest banner on a gate in front of the stage where a speech by Vice President Gore and others was being given. Plaintiff Katz also alleges that he was taken from the crowd, using unnecessary and excessive force, and placed in a police van before being ultimately released without having charged filed against him.

The speech in question was given to the public as part of base conversion celebration activities. By press release dated September 20, 1994 and other publicity, the National Park Service invited the public to attend

an event to be held at the Presidio on September 24, 1994 "commemorating the Presidio's historic transfer from military post to national park" on October 1, 1994. Hundreds of people attended the event. Plaintiff Katz alleges that the banner was confiscated from him by defendants to prevent him and his organization from expressing sentiments critical of the treatment of animals in medical research to be conducted at the Presidio's Letterman Hospital.

On September 24, 1994, the date of the original incident, the Presidio was still a military installation.[1] On Wednesday, September 28, 1994, the National Park Service faxed plaintiffs a copy of their regulations regarding "First Amendment activity" for the Presidio's base conversion celebration on October 1, 1994. The regulations required plaintiffs to apply for a petition before engaging in First Amendment activities, and restricted such activities to four designated areas.

On September 29, 1994, plaintiffs sought a temporary restraining order asking the Court to enjoin defendants from preventing plaintiffs from distributing leaflets and materials at any of the public events at the Presidio on October 1, 1994. Plaintiffs claimed that the entire Presidio was a "public forum," and that the restrictions on speech were invalid. Defendants claimed that certain so-called "military footprint" areas of the Presidio were nonpublic fora, and that restrictions on speech were valid time, place, and manner restrictions.

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[1] On October 1, 1994, the Presidio became part of the National Park Service.

In light of the government's representation that it would provide five additional designated areas within the Presidio for plaintiffs to engage in leafletting and other free speech activities on October 1, 1994, the Court denied plaintiff's motion for a temporary restraining order. In an Order dated November 2, 1994, the Court explained in more detail its reasoning for denying the TRO. The Court concluded that plaintiffs had raised valid arguments as to the unconstitutionality of the Presidio regulations, but had not met the strict standard required for granting a TRO.

On March 22, 1995, plaintiffs file a First Amended Complaint, which alleged additional facts relating to defendant Lee and named Lieutenant General Glynn Mallory, Sergeant Steven Parker, and Private First Class Donald Saucier as additional defendants. The first claim in the First Amended Complaint alleges that the defendants acted to unlawfully restrict plaintiffs' First Amendment activity at a designated public forum and mistreated plaintiffs because of the content of their speech. Plaintiffs' second claim alleges that the defendants violated plaintiff Katz's fourth amendment right to be free from unreasonable searches and seizures and the use of excessive force.

Defendants moved to dismiss the damages claims or, in the alternative, for summary judgment on two separate grounds: (1) that plaintiffs' claims fail to state sufficient facts to satisfy the heightened pleading rule; and (2) that defendants are entitled to qualified immunity. At the same time, plaintiffs sought a declaration from this Court as to the legality of the Presidio's regulations (1) that "No First Amendment activities are permitted within any areas [of the Presidio]

permitted to the U.S. Army" because the area is not a public forum, and (2) that all "First Amendment Activities" are restricted to certain designated areas and that permits to conduct First Amendment activities may be denied at the discretion of the Superintendent.

In an order dated October 3, 1995, the Court dismissed plaintiffs' Fourth Amendment damages claim against Mallory with leave to amend by October 25, 1995. In all other respects, the Court denied defendants' motion to dismiss. In the same order, the Court also denied plaintiffs' motion for partial summary judgment and declaratory relief, finding that plaintiffs were not entitled to a declaratory judgment that the Park Service's restrictions on the location of demonstrations and leafletting are per se invalid as a matter of law and that application of the restrictions would have to be judged on a case-by-case basis.

B. The October 1, 1994 Event

The current motion for summary judgment challenges the Park Service's regulation as applied to plaintiffs at the Presidio's base conversion celebration on October 1, 1994. According to plaintiffs, the areas designated by the Park Service for plaintiffs to pass out literature regarding the use of Presidio's Letterman Hospital were out of sight and out of reach of the individuals who took the Letterman tour. Plaintiffs also allege, and defendants concede, that the Park Service treated plaintiffs differently than the event "co-sponsors" who were allowed to hand out leaflets and set up booths in the main event area.

Plaintiffs ask this Court to declare that: (1) future regulation of First Amendment activities cannot provide greater access to sponsors than to plaintiffs and other non-sponsors; (2) defendants' governmental interest in protecting potentially unwilling listeners from being "hassled" with leaflets is not sufficient reason to justify time, place and manner restrictions; and (3) any regulation of First Amendment activity to designated areas must occur evenhandedly and provide for close proximity to the stream of pedestrian traffic. In response, defendants argue that (1) the law of the case doctrine precludes this Court from deciding the issues in plaintiffs' motion; (2) plaintiffs do not have standing to secure First Amendment declaratory relief; (3) the Park Service's restrictions are valid time, place and manner regulations; and (4) further discovery may be necessary pursuant to Rule 56(f).

II. DISCUSSION

A. Law of the Case Doctrine

The law of the case doctrine does not bar this Court from hearing and deciding plaintiffs' present summary adjudication motion. In general, the law of the case doctrine prevents courts from "reconsidering an issue previously decided by the same court, or a higher court in the identical case." *Securities Investor Protection Corp. v. Vigman*, 74 F.3d 932, 937 (9th Cir. 1996) (quoting *Milgard Tempering, Inc. v. Selas Corp. of Am.*, 902 F.2d 703, 715 (9th Cir. 1990). For the doctrine to apply, however, "the issue in question must have been 'decided explicitly or by necessary implication in [the] previous disposition.'" *Id.*

In this case, plaintiffs present new evidence and legal theories which were not available or before the Court in the previous summary judgment motion. Specifically, plaintiffs raise two new legal arguments based upon the deposition testimony of Superintendent Brian O'Neill and the written discovery responses of defendants. Because these new legal arguments were not addressed explicitly or by necessary implication in the prior summary judgment motion, the law of the case doctrine does not apply.

Moreover, the Court's October 1995 order denying summary judgment was not a final decision subject to the law of the case doctrine. As local rule 56-3 emphasizes:

> Statements contained in an order of the court denying a motion for summary judgment or summary adjudication shall not constitute issues deemed established for purposes of the trial of the case, unless the court so specifies.

Civ. L.R. 56-3. "[U]ntil entry of judgment, [Rule 56(a) decisions] remain subject to change at any time. The doctrine of the law of the case does not limit the power of the court in this respect." IB *Moore's Federal Practice 2d*, Law of the Case, ¶0.404[2] at 124. Because the October 1995 order did not result in the entry of judgment, the law of the case doctrine does not prevent this Court from exercising its broad authority to revisit issues discussed in that order.

B. Standing

The Article III constitutional prerequisites to standing are (1) an injury in fact which is concrete and not conjectural; (2) a causal connection between the injury

and defendant's conduct or omissions, and (3) a likelihood that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992). The burden of establishing standing rests with the party invoking federal jurisdiction. *Id.*

Defendants argue that plaintiffs lack standing because the [sic] they have failed to satisfy the injury prong of the constitutional standing test. Where equitable relief from future conduct is sought, a litigant must demonstrate "a credible threat of future injury." *Presbyterian Church v. United States*, 870 F.2d 518, 528-29 (9th Cir. 1989) (citations omitted). Defendants argue that plaintiffs have no standing to request declarative relief addressing defendants' future regulation of First Amendment activities because they have failed to demonstrate that they are "realistically threatened by a repetition of [their past] experience." *See City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983). Plaintiffs respond that they have standing because the underlying dispute between the parties is "capable of repetition, yet evading review." *See Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911); *Presbyterian Church*, 870 F.2d at 528 (9th Cir. 1989).

Because of the First Amendment context, the standing issue presents a close question in this case. Courts often apply relaxed standing rules to First Amendment challenges to prevent chilling protected speech. *See Blair v. Shanahan*, 38 F.3d 1514 (9th Cir. 1994) (citing *Ripplinger v. Collins*, 868 F.2d 1043, 1047 (9th Cir. 1989) and *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 798-99 (1984)). At a minimum, however, courts generally require that a plaintiff demonstrate a desire to continue to engage in the First Amendment

activity proscribed by the challenged regulation and some reasonable likelihood that a similar opportunity to engage in that activity will arise. *See Blair*, 38 F.3d at 1519 (holding that plaintiff's "First Amendment claim for a declaratory judgment is moot if he no longer wishes to engage in activity proscribed by the challenged statute"); *Golden v. Zwickler*, 394 U.S. 103, 106 (1969) (finding no standing when plaintiff no longer wished to distribute handbills because the member of Congress who was the target of the campaign was no longer running for office); *Steffel v. Thompson*, 415 U.S. 452 (1974) (remanding for district court to determine whether petitioner still desired to engage in handbilling since the American involvement in Vietnam had subsided).

Although plaintiffs have demonstrated a desire to continue to participate in First Amendment activity, on this record the Court cannot find that plaintiffs have demonstrated a reasonable likelihood that they will be presented with a similar opportunity to engage in that activity in the future. Plaintiffs fail to point to any evidence that they have sought or plan to seek accommodation of the exercise of their First Amendment rights at any particular future Presidio event. Moreover, they fail to present evidence that any organized events are planned at the Presidio in the foreseeable future. Instead, they note only that the future of the Presidio, especially the use of Letterman Hospital, has not been resolved and that they intend to "continue to voice their opinion and participate in public events in the Presidio."

This Court can only speculate about the possibility of injury to plaintiffs from a future application of the Park

Service's First Amendment restrictions. Although plaintiffs point to deposition statements by Superintendent O'Neill indicating that defendants will continue [sic] have sponsors and non-sponsors at future events, there is no certainty that conditions at future public events will mirror those which existed on October 1, 1994 or, indeed, that future events governed by Park Service regulations will even occur.[2] In sum, given the precarious position of the Park Service at the Presidio and the unique nature of the October 1, 1994 event, this Court cannot say with any certainty that the Park Service regulations will ever again be applied, much less applied to plaintiffs in the same manner and under the same circumstances as existed on October 1, 1994.

Each event at the Presidio has a different purpose and different logistics, and poses a different set of challenges for Park Service personnel charged with the responsibility of applying any restrictions on First Amendment activity. Despite the different circumstances surrounding each event, however, a few general guidelines always will apply: persons wishing to distribute First Amendment literature must be permitted to reach the event audience, and any restrictions on their ability to leaflet within the Park must be both content-neutral and narrowly tailored. *See Perry Educational Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *Ward v. Rock Against Racism*, 109 S. Ct. 2746, 2753 (1989) (citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)); *see also*

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[2] At the hearing on this matter, defendants informed the Court that the Park Service's tenure as operator of the Presidio may be limited.

Bay Area Peace Navy v. United States, 914 F.2d 1224, 1229 (9th Cir. 1990) ("an alternative is not ample if the speaker is not permitted to reach the intended audience"). Moreover, when an event in the Presidio focuses on a topic of public concern, the government must be particularly careful to neutrally apply any restrictions on First Amendment activity. As the *Turner Broadcasting* decision emphasized:

> At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rests upon this ideal. (citations omitted) Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential right. Laws of this sort pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion.

114 S. Ct. at 2458.

Beyond these general constitutional guidelines, as this Court has already ruled, the application of Park Service regulations must be judged on a case-by-case basis.

III. CONCLUSION

For the reasons discussed above, the Court finds that plaintiffs have failed to meet their burden of demonstrating standing to request the declaratory relief

sought. Plaintiffs' motion for declaratory relief is DENIED.

IT IS SO ORDERED.

Dated: June 27, 1996

/s/ D. LOWELL JENSEN
D. LOWELL JENSEN
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-16298
D.C. No. CV-94-03466-DLJ

ELLIOT M. KATZ; IN
DEFENSE OF ANIMALS, PLAINTIFFS-APPELLEES

v.

UNITED STATES OF AMERICA; CORBIN LEE, MAJOR;
BRIAN O'NEILL; STEVEN PARKER, SERGEANT;
GLYNN C. MALLORY, JR., GENERAL, DEFENDANTS
AND
DONALD SAUCIER, PRIVATE, DEFENDANT-APPELLANT

[Jan. 10, 2000]

ORDER

Before: THOMPSON and GRABER, Circuit Judges, and CARROLL, District Judge*

The panel has voted to deny appellant's petition for rehearing. Judge Graber has voted to deny the petition for rehearing en banc, and Judges Thompson and Carroll have recommended denial of the petition for rehearing en banc.

---

* The Honorable Earl H. Carroll, United States Senior District Judge for the District of Arizona, sitting by designation.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc are DENIED.

Supreme Court, U.S.
FILED
OCT 17 2000
CLERK

(2)

No. 99-1977

In The

Supreme Court of the United States

DONALD SAUCIER,

Petitioner,

v.

ELLIOT M. KATZ AND
IN DEFENSE OF ANIMALS,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

RESPONSE TO PETITIONER'S WRIT OF CERTIORARI

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INTRODUCTION

Respondent, Elliot M. Katz and In Defense of Animals agrees with the Petitioner, Donald Saucier, that a Writ of Certiorari should be granted. There is a significant split among the circuit courts that requires resolution by this Court. In addition, there is confusion and inconsistency in the trial courts throughout the country facing the task of administering excessive force cases because there is no clear methodology for them to follow. The result is a waste of precious judicial resources as the proper standard of determining qualified immunity is being litigated over and over again at both the summary judgment and trial levels. Certiorari is appropriate to establish a clear, simple, method for the trial courts to use in excessive force cases.

STATEMENT

The Petitioner makes a few statements of fact that deserve clarification. First, Dr. Katz did not resist arrest as has been claimed by Saucier. Saucier testified that Dr. Katz "resisted by putting his feet on the van's bumper and pushing away. So we had to use our heads putting him into the back of the vehicle." 25A (all factual citation is to Petitioner's brief) Dr. Katz's testimony, recognized by the courts below, was that he did not resist arrest: "Although Saucier disputes whether Katz resisted arrest, Katz says that he did not." 15A. Nor could Dr. Katz have pushed off the back of the bumper even if he had tried: The video shows that he did not do so, nor did he have time to do so. Finally, a sixty year old man with a fractured foot, no shoe and a splint, 27A, is unlikely to try to put pressure on it or be able to bear much weight upon it. As both the trial court and appellate court held, this is an issue of fact for the jury to decide. 27A, 15A ("From all that appears at this stage of the case, he did not pose an

immediate threat to the safety of the officers or anyone else.")

Second, Petitioner's statement claims that there was an "atmosphere of uncertainty" 29 that supports the reasonableness of the officers' actions as if Dr. Katz sprung up unknown to them. Both the trial court and the appellate court, however, acknowledged testimony given by the officers themselves that Dr. Katz was pointed out to them before they arrested him. 3A ("Saucier admits that Katz was 'pointed out as one of the potential, you know, activists' and that he knew 'who this person was . . . this person we need[ed] to keep an eye on.' ") 26A ("we pretty much had a heads-up on him, sir.").

Finally, Petitioner's statement that "respondent did not fall headlong into the van" 3, is inaccurate. Dr. Katz did fall headlong into the van which is clear from the trajectory on the video that can be seen when he is given a violent shove. Defendants have taken Dr. Katz's honesty and forthrightness in his explaining that he was able at the last moment to brace himself with his hands to prevent his face from hitting the floor and stretched it to a conclusion that he did not go in headlong – this is untrue.

REASONS FOR GRANTING THE PETITION

The primary reason for this Court to hear this case is that there is a significant split in the circuits that needs to be reconciled. Just as important, however, is that this Court hear this case to provide a clear, simple, uniform, methodology for the trial courts to handle the issue of qualified immunity in excessive force cases. The present disarray is causing unequal outcomes and a tremendous waste of judicial resources as qualified immunity is being litigated at least twice, sometimes three times (summary judgment, jury instructions and post trial motions), in every case. Petitioner has a fine set of appellate lawyers,

but they seem oblivious to the trial court ramifications of the convoluted standards they espouse.

Qualified immunity in an excessive force case should be argued once at the summary judgment stage. The trial judges should apply the immunity and it should be a high standard of protection to weed out meritless cases that do not deserve to go to trial. If there is a genuine question of fact for trial, however, then the decision of whether the officer acted in a reasonable manner is for the jury, using instructions based upon *Graham v. Conner*, 490 U.S. 386 (1989), and their decision should not be second guessed by the judge again applying qualified immunity through post trial motions.

Nowhere does Petitioner discuss the impact of his interpretation of qualified immunity upon trial, but Dr. Katz's counsel, having handled trials for both plaintiffs and defendants in excessive force cases, is well aware that this case is in part an effort by the defense bar to supplant the role of the jury in excessive force cases and have judges decide whether officers have acted reasonably using qualified immunity. Defense lawyers hope to accomplish this by, as they do in Petitioner's brief at page 18, arguing that the protection of qualified immunity has "wider boundaries" thereby giving officers greater protection than the *Graham* standard. Since it is the judge who decides the issue of qualified immunity, if the immunity decision is "wider" than the reasonableness analysis of *Graham*, and qualified immunity is applied post trial, then it is left for the judge to second guess the jury and decide whether an officer could have "reasonably thought he could act unreasonably" even if the jury has just decided that the officer acted unreasonably.

The entire "reasonably acted unreasonably" analysis is incomprehensible to the average person and makes a mockery of the jury's decision. Even to the able minds of the Justices and clerks of this Court, Petitioner's legal analysis regarding qualified immunity must seem

abstruse. Petitioner does not seem to appreciate how *Graham* clarified this area of law and is now muddling it up again. The United States, with its state and federal judiciaries, is fortunate to have one of the best, if not the best, group of judges of any country. But the issue for this Court to decide is not about the quality of the judges, it is about the proper role of the jury. Given the evidence on the video, Dr. Katz's own testimony, and officer Saucier's untruth that Dr. Katz was pushing off the rear bumper with his fractured foot to resist arrest, it simply is not the role of the trial court to decide whether Saucier acted reasonably – it is the role of the jury. The trial judge, D. Lowell Jensen, a former prosecutor, and judge David R. Thomson, writing for the appellate court, so concluded.

The outcome of this case should rest on fundamental bedrock principles: The power of the police and politicians to govern emanates from the people governed. If the famous words of Thomas Jefferson that "governments are instituted among men, deriving their just powers from the consent of the governed" are to be applied, then the people of the United States have given the police the power to arrest them and use force if warranted, but they have only given their consent based upon the assumption that it is they, not judges (no matter how outstanding they may be) that are to decide whether on officer has acted reasonably when there is a triable issue of fact concerning the use of excessive force. Any outcome that allows the judge to second guess the jury after it has applied the *Graham* standard is the height of judicial activism and violative of the seventh amendment.

The remaining question is what standard should be used by the trial judge at summary judgment to weed out the meritless cases. The answer is that the second prong of the qualified immunity test, reasonableness, should be used by the trial court to eliminate meritless cases. It is important, however, that a proper, objective test for reasonableness be used. Petitioner skews the test. Petitioner

states "[w]hatever one might think of the constitutionality of those uses of force, neither was so clearly unreasonable that no officer could have thought it to be lawful at the time." 24. This is an erroneous standard. It does not matter that the defendant can show that one or two officers would have thought the conduct reasonable. The reasonableness standard that this Court has set out for the trial courts is that of the generic reasonable officer – an objective standard. This was the beauty of *Graham*, it set forth an objective test that could be easily understood and applied. *Graham*, at the time it was decided, was not thought to be pro-defense or pro-plaintiff – it created a clear, workable, standard.

The Court should use this case to give the trial courts the following directions: First, determine whether the law was clearly established. Second, determine whether the reasonable officer could have thought the force used was reasonable. Third, if there is a genuine question of material fact precluding summary judgment, then the jury will determine the facts and decide whether the officer acted reasonably following instructions based upon *Graham*.

Respondent, Dr. Katz, looks forward to briefing these important issues for the Court so that the split in the circuits can be resolved through the creation of a clear, simple, method that is respectful of the important role of the jury.

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Supreme Court, U.S.
FILED
OCT 27 2000
OFFICE OF THE CLERK

No. 99-1977

In the Supreme Court of the United States

DONALD SAUCIER, PETITIONER

v.

ELLIOT M. KATZ AND IN DEFENSE OF ANIMALS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

No. 99-1977

DONALD SAUCIER, PETITIONER

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REPLY BRIEF FOR THE PETITIONER

1. Respondent agrees that "[t]here is a significant split among the circuit courts" concerning the proper test for qualified immunity in Fourth Amendment unreasonable force cases. Resp. Br. 1. Respondent further agrees that the petition for a writ of certiorari "should be granted" in this case to resolve that division of authority. *Ibid.* See also *id.* at 2 (division in circuit authority responsible for "unequal outcomes" and "disarray" in appellate caselaw). Finally, respondent confirms that this case both properly raises the issue and provides an appropriate vehicle for resolving it. See *id.* at 5 ("split in the circuits can be resolved" in this case; "Court should use this case" to instruct trial courts on how to handle qualified immunity in such cases).

2. After agreeing that this Court should grant the petition for a writ of certiorari, respondent turns to the merits, contending that courts should equate the qualified immunity inquiry in excessive force cases with the test of substantive reasonableness under the Fourth Amendment, as the Ninth Circuit did below. See Resp. Br. 3-5. Respondent, however, makes no effort to reconcile that immunity standard (or the court of appeals' rationale for it) with this Court's cases, including *Anderson* v. *Creighton*, 483 U.S. 635 (1987), which specifically addresses qualified immunity in the Fourth Amendment context. See Pet. 15-22. Nor does respondent attempt to reconcile the court of appeals' decision with this Court's repeated recognition that qualified immunity cannot be denied merely because the conduct is later held to be unlawful; instead, the Court has explained, immunity may be denied only "if, on an objective basis, it is *obvious* that *no reasonably competent officer* would have concluded" that the conduct was lawful at the time the defendant acted. *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986) (emphasis added). See also *ibid.* ("if officers of reasonable competence could disagree on" the lawfulness of the conduct, "immunity should be recognized"); *Wilson* v. *Layne*, 526 U.S. 603, 614-615 (1999) ("'[C]learly established' for purposes of qualified immunity means that '[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'") (quoting *Anderson* v. *Creighton*, 483 U.S. at 639-640); *Hunter* v. *Bryant*, 502 U.S. 224, 229 (1991) (per curiam) (qualified immunity "'gives ample room for mistaken judgments' by

protecting 'all but the plainly incompetent or those who knowingly violate the law.'" (quoting *Malley*, 475 U.S. at 343, 341)).[1]

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[1] While respondent devotes some of his brief to "clarification" of certain facts, Resp. Br. 1, he does not suggest that the clarifications affect the suitability of this case as a vehicle for further review. Nor do we, since they do not signal the presence of factual disputes that might preclude or complicate resolution of the qualified immunity issues presented by the petition. First, respondent points out that he denied resisting arrest or pushing off the bumper with his feet. See *ibid.* We do not (for present purposes) contend otherwise, but we do point out that the issue here is not what respondent did; it is what the officers reasonably believed. See Pet. 29-30 (citing *Hunter*, 502 U.S. at 228). Second, respondent suggests (Resp. Br. 2) that petitioner and the other officers did not confront an "atmosphere of uncertainty," because respondent had been "pointed out" to the officers before they arrested him. That, however, is not inconsistent with our assertion (Pet. 29) that there was uncertainty, not as to respondent's identity as a potential protester, but rather as to his likely response, and the likely response of the crowd around him, to the officers' attempt to take him into custody. See Pet. 26-27. Finally, respondent argues (Resp. Br. 2) that he fell "headlong" into the van because, although respondent testified that he caught himself or "brace[d] himself with his hands," that action merely prevented him from striking his head, and did not prevent him from falling down. Any disagreement on that point appears to be over the meaning of the word "headlong"—*i.e.*, over whether or not the word properly applies to a fall in which the individual uses his hands to limit the fall and suffers no physical injury—and not over the events that took place. See *Webster's New World Dictionary* 644 (1986) (defs. 1 and 2) (defining headlong as "with uncontrolled speed and force" or as "headfirst"). The fundamental nature of respondent's fall—forward, inside the van—is not contested. Nor are the facts that the "shove" respondent characterizes as "violent" came from Sergeant Parker rather than petitioner, Pet. 27-28 & n.19, or that respondent suffered no injury of any variety, Pet. 3. There thus are no material disputes concerning the facts that must be taken as true at this stage of the case, and much of the relevant conduct (includ-

Instead, respondent argues that employing different tests for qualified immunity and substantive reasonableness under the Fourth Amendment would be unnecessarily confusing, Resp. Br. 3-4, and would permit judges to substitute their views of the evidence for the jury's, *id.* at 3, 4. Neither contention is correct. As *Anderson* v. *Creighton* itself proves, there is nothing unnecessarily confusing about employing the traditional qualified immunity standard, even where the constitutional standard itself is defined in terms of reasonableness, and at least six courts of appeals have applied that teaching in excessive force cases. See Pet. 13-15. A court addressing a qualified immunity claim on summary judgment must, for purposes of the motion, resolve all material factual disputes in favor of the plaintiff and "look[] to the evidence before it (in the light most favorable to the plaintiff)." *Behrens* v. *Pelletier*, 516 U.S. 299, 309 (1996). The court then must ask whether, under those circumstances, any reasonable officer could have thought the conduct in question lawful. If the answer is "yes," immunity must be granted. See *Malley*, 475 U.S. at 341 ("if officers of reasonable competence could disagree on" the lawfulness of the conduct, "immunity should be recognized"). If instead, "on an objective basis, it is obvious that no reasonably competent officer would have concluded" that the conduct was lawful, immunity should be denied. *Ibid.*

The fact that the case concerns a Fourth Amendment unreasonable force claim does not alter the fundamental nature of the qualified immunity inquiry. Even if the officer's conduct might be "objectively unreasonable" and thus a violation of the Fourth Amendment, *Gra-*

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ing respondent's fall) is in any event recorded on the videotape that has been submitted to this Court.

ham v. *Connor*, 490 U.S. 386, 397 (1989), the officer is entitled to immunity unless the conduct was so clearly proscribed by the Fourth Amendment—*i.e.*, the unreasonableness sufficiently well established—at the time the officer acted that no reasonably competent official could have thought the conduct lawful. See *Priester* v. *City of Riviera Beach*, 208 F.3d 919, 926-927 (11th Cir. 2000) (immunity is appropriate unless conduct "was so far beyond" the sometimes "hazy border between excessive and acceptable force that [the official] had to know he was violating the Constitution," *i.e.*, unless "application of the [excessive force] standard would inevitably lead every reasonable officer in [the defendants'] position to conclude the force was unlawful") (citations omitted); *Finnegan* v. *Fountain*, 915 F.2d 817, 822-824 (2d Cir. 1990) (even if officer exerts "constitutionally excessive force," qualified immunity is appropriate unless it "should have been apparent" that the "particular degree of force under the particular circumstances was excessive").[2]

Nor does applying the ordinary qualified immunity test in Fourth Amendment unreasonable force cases permit courts to intrude into "the role of the jury" by "second guess[ing] the jury after it has applied the

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[2] Respondent also argues that whether "one or two officers would have thought the conduct reasonable" should make no difference, because the standard is objective rather than subjective. Resp. Br. 5. But the objective standard, as described by this Court, is whether, "on an objective basis, it is obvious that no reasonably competent officer would have concluded" that the conduct is lawful. *Malley*, 475 U.S. at 341. In other words, the conduct is protected by qualified immunity unless any officer who engages in it would be either "plainly incompetent or * * * knowingly violat[ing] the law." *Hunter*, 502 U.S. at 229 (quoting *Malley*, 475 U.S. at 341).

Graham standard." Resp. Br. 4. A court no more intrudes on the jury's function in excessive force and qualified immunity cases than in any other situation in which a court grants judgment as a matter of law.[3] Moreover, when courts address qualified immunity, they view the *facts* in the light most favorable to the verdict (where the issue arises after trial) or the non-moving party (if the issue arises on summary judgment). That requirement ensures that courts do not intrude on the jury's factfinding role.

* * * * *

Last term, this Court granted a writ of certiorari in *Snyder* v. *Trepagnier*, cert. granted, 525 U.S. 1098 (1999) (No. 98-507), to resolve the same issue raised by this case. Because *Snyder* settled before decision, the writ was dismissed. See 526 U.S. 1083 (1999). This case presents the Court with an appropriate occasion to resolve the issue that dismissal in *Snyder* left unresolved, and which still divides the courts of appeals.

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[3] See *Weisgram* v. *Marley Co.*, 120 S. Ct. 1011, 1018 (2000); see also Fed. R. Civ. P. 50 advisory committee's note (1991 Amendment) ("The expressed standard makes clear that action taken under the rule is a performance of the court's duty to assure enforcement of the controlling law and is not an intrusion on any responsibility for factual determinations conferred on the jury by the Seventh Amendment or any other provision of federal law.").

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

OCTOBER 2000

Supreme Court, U.S.
FILED
JAN 8 2001
CLERK

No. 99-1977

In the Supreme Court of the United States

DONALD SAUCIER, PETITIONER

v.

ELLIOTT M. KATZ AND IN DEFENSE OF ANIMALS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED: JUNE 8, 2000
CERTIORARI GRANTED: NOVEMBER 13, 2000

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-16298

ELLIOT M. KATZ; IN DEFENSE OF ANIMALS, PLAINTIFFS-APPELLEE

v.

UNITED STATES OF AMERICA; MAJOR CORBIN LEE; BRIAN O'NEILL; SERGEANT STEVEN PARKER; GENERAL GLYNN C. MALLORY, JR., DEFENDANTS AND PRIVATE DONALD SAUCIER, DEFENDANT-APPELLANT

DOCKET ENTRIES

DATE	DOCKET ENTRY
7/17/98	Docketed cause and entered appearances of counsel * * *.
	* * * * *
9/21/98	Order filed defendants' motion to dismiss appeal 98-16121 is granted. [3482802-1] in 98-16298. The brfing schedule for appeal 98-16298 is amended as follows: the opening brf is due 10/30/98; the answering brf is due 11/30/98; the optional rpy brf is due within 14 days after service of the answering brf.

DATE	DOCKET ENTRY
	(Procedurally Terminated After Other Judicial Action; Jurisdictional Defects. * * * Diarmuid F. O'SCANNLAIN; Ferdinand F. FERNANDEZ; A. W. TASHIMA, author) (98-16298) [98-16121, 98-16298] (jr) [98-16121 98-16298]
10/30/98	Filed original and 15 copies Appellant Donald Saucier opening brief (Informal: n) 24 pages and five excerpts of record in 1 vol.; served on 10/29/98 [98-16298] (hh) [98-16298]
11/25/98	14 day oral extension by phone of time to file Appellee's brief. [98-16298] appellees' brief due 12/14/98, ; the optional reply brief is due 14 days from service of the answering brief. (cg) [98-16298]
12/16/98	Filed original and 15 copies appellees Elliot M. Katz and Defense of Animal's brief; served on 12/14/98 [98-16298] (hh) [98-16298]
12/29/98	Filed original and 15 copies Donald Saucier reply brief, (Informal: n) 10 pages; served on 12/28/98 [98-16298] (hh) [98-16298]

* * * * *

DATE	DOCKET ENTRY
8/10/99	ARGUED AND SUBMITTED TO David R. THOMPSON, Susan P. GRABER, Earl H. Carroll [98-16298] (gb) [98-16298]
10/22/99	FILED OPINION: AFFIRMED (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. David R. THOMPSON, author; Susan P. GRABER; Earl H. Carroll.) FILED AND ENTERED JUDGMENT. [98-16298] (hh) [98-16298]
12/6/99	[3803603] Filed original and 50 copies Appellant Donald Saucier petition for rehearing with suggestion for rehearing en banc; 15 p.pages, served on 12/3/99 (PANEL AND ALL ACTIVE JUDGES) [98-16298] (hh) [98-16298]
1/10/00	Filed order (David R. THOMPSON, Susan P. GRABER, Earl H. Carroll,): . . . The petition for rehearing and the petition for rehearing en banc are DENIED. [98-16298] (hh) [98-16298]
1/19/00	MANDATE ISSUED [98-16298] (jjf) [98-16298]

DATE	DOCKET ENTRY
4/3/00	Received letter from the Supreme Court dated 3/30/00 re: application for an ext of time within which to file a petition for a writ of certiorari . . . extended the time to and including 5/9/00. (CASEFILES) [98-16298] (hh) [98-16298]
5/4/00	Received letter from the Supreme Court dated 5/1/00 re: application for an ext of time within which to file a petition for a writ of certiorari. . . . extended the time to and including 6/8/00. (CASEFILES) [98-16298] (hh) [98-16298]
6/12/00	Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 99-1977 filed on 6/8/00. [98-16298] (hh) [98-16298]
7/6/00	RECORD RETURNED. (See control card for details.) (jay) [98-16298]
11/16/00	Received notice from Supreme Court, petition for certiorari GRANTED on 11/13/00. Supreme Court No. 99-1977 (hh) [98-16298]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
(OAKLAND)

No. 94-CV-3466

ELLIOT M. KATZ;
IN DEFENSE OF ANIMALS, PLAINTIFFS,

v.

UNITED STATES OF AMERICA,
MAJOR CORBIN LEE, BRIAN O'NEILL,
SERGEANT STEVEN PARKER, PRIVATE DONALD
SAUCIER, GENERAL GLYNN C. MALLORY, JR.;
DEFENDANTS

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
9/29/94	1	COMPLAINT Summons(es) issued; Fee status pd entered on 9/29/94 in the amount of $ 120.00 (Receipt No. 111945) [3:94-cv-03466] (fw) [Entry date 09/29/94]

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
3/22/95	42	AMENDED COMPLAINT [1-1] by Plaintiff Elliot M. Katz, Plaintiff In Defense of Animal terminating defendant William D. Swift; adding Steven Parker, Donald Saucier, Glynn C. Mallory JR. [4:94-cv-03466] (mh) [Entry date 03/23/95]
		* * * * *
10/25/95	79	SECOND AMENDED COMPLAINT [42-1] by Plaintiff Elliot M. Katz, Plaintiff In Defense of Animal [4:94-cv-03466] (mh) [Entry date 10/27/95]
		* * * * *
11/6/95	82	ANSWER by defendant USA, defendant Corbin Lee, defendant Brian O'Neill, defendant Steven Parker, defendant Donald Saucier, defendant Glynn C. Mallory Jr. to 2ND Amended Complaint [79-1] [4:94-cv-03466] (mh) [Entry date 11/07/95]

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
4/2/96	91	Notice of motion and MOTION before Judge D. L. Jensen by Plaintiffs for partial summary judgment and request for declaratory relief; with Notice set for 5/8/96 at 10:00 [4:94-cv-03466] (kc) [Entry date 04/02/96]
4/2/96	92	MEMORANDUM by Plaintiff in support of motion for partial summary judgment and request for declaratory relief; [91-1] [4:94-cv-03466] (kc) [Entry date 04/02/96]
		* * * * *
4/19/96	94	OPPOSITION by defendants to motion for partial summary judgment and request for declaratory relief; [91-1] [4:94-cv-03466] (oh) [Entry date 04/19/96]

DATE	DOCKET NUMBER	PROCEEDINGS
4/24/96	95	REPLY MEMORANDUM by Plaintiff in support of the motion for declaratory relief and partial summary judgment [4:94-cv-03466] (mh) [Entry date 04/25/96]
4/24/96	96	DECLARATION by Kirk Boyd on behalf of Plaintiff in support of the reply memorandum [95-1] [4:94-cv-03466] (mh) [Entry date 04/25/96]
	* * * * *	
6/27/96	98	ORDER by Judge D. L. Jensen denying motion for partial summary judgment and request for declaratory relief [91-1], Plaintiffs' motion for declaratory relief is DENIED (Date Entered: 7/2/96) (cc: all counsel) [4:94-cv-03466] (mh) [Entry date 07/02/96]

DATE	DOCKET NUMBER	PROCEEDINGS
10/11/96	99	MOTION before Judge D. L. Jensen by defendant for summary judgment with Notice set for 11/20/96 at 10am [4:94-cv-03466] (mh) [Entry date 10/15/96]
11/6/96	100	AMENDED MOTION before Judge D. L. Jensen by defendant for partial summary judgment with Notice set for 1/22/97 at 10am [4:94-cv-03466] (mh) [Entry date 11/07/96]
1/2/97	101	MEMORANDUM by Plaintiff in opposition to the motion for summary judgment [4:94-cv-03466] (mh) [Entry date 01/03/97]
1/2/97	102	DECLARATION by J. Kirk Boyd on behalf of Plaintiff in opposition to the motion for summary judgment [4:94-cv-03466] (mh) [Entry date 01/03/97]

DATE	DOCKET NUMBER	PROCEEDINGS
1/8/97	103	REPLY MEMORANDUM by defendant to the motion for partial summary judgment [100-1] [4:94-cv-03466] (mh) [Entry date 01/09/97]
2/5/97	104	MINUTES: (C/R Carol Karen) Hearing held that the motion for partial summary judgment [100-1] is submitted [4:94-cv-03466] (mh) [Entry date 02/07/97]
2/24/97	105	ORDER by Judge D. L. Jensen granting motion for partial summary judgment [100-1] on First Amendment casuse of action on the basis of qualified immunity; DEFERS ruling on defendants summary judgment on the Fourth Amendment Cause of Action and the Court does not reach merits of defendants motion for summary judgment on the First Amendment cause of action. (Date Entered: 2/28/97) (cc: all counsel) [4:94-cv-03466] (oh) [Entry date 02/28/97]

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
9/16/97	—	RECEIVED Video Tape submitted by Plaintiff [4:94-cv-03466] (mh) [Entry date 09/16/97]
9/16/97	—	RECEIVED Video Tape (For the hearing motion 2/15/95) submitted by Plaintiff [4:94-cv-03466] (mh) [Entry date 07/24/98]
10/3/97	108	MOTION by defendants for summary judgment with Notice set for 11/12/97 at 10am [4:94-cv-03466] (mh) [Entry date 10/03/97]
10/22/97	109	OPPOSITION by Plaintiff to the motion for partial summary judgment [4:94-cv-03466] (mh) [Entry date 10/23/97]
10/28/97	110	DECLARATION by R. Joseph Sher on behalf of defendants in support of the motion for summary judgment [108-1] [4:94-cv-03466] (mh) [Entry date 10/29/97]

DATE	DOCKET NUMBER	PROCEEDINGS
11/12/97	111	MINUTES: (C/R Rosita Flores) (Hearing Date: 11/12/97) that the motion for summary judgment [108-1] is submitted pending further briefing: plaintiff to supply brief by 12/10/97; defense response by 1/24/98 [4:94-cv-03466] (kk) [Entry date 11/18/97]
12/10/97	112	STIPULATION and ORDER by Judge D. L. Jensen: continuing Defendants' motion for summary judgment, to & including 1/9/98 (cc: all counsel) [4:94-cv-03466] (mh) [Entry date 12/15/97]
1/13/98	113	STIPULATION and ORDER by Judge D. L. Jensen: continuing the filing dates for supplemental briefing re Defendants' motion for summary judgment, to & including 2/13/98; Defendants' brief shall be filed by 2/27/98 (cc: all counsel) [4:94-cv-03466] (mh) [Entry date 01/14/98]

DATE	DOCKET NUMBER	PROCEEDINGS
1/13/98	114	DECLARATION by Kirk Boyd on behalf of Plaintiff in support of the opposition [109-1] [4:94-cv-03466] (mh) [Entry date 01/14/98]
2/13/98	115	SUPPLEMENT by Plaintiff re opposition memorandum [101-1] [4:94-cv-03466] (mh) [Entry date 02/17/98]
2/27/98	116	SUPPLEMENTAL REPLY MEMORANDUM by defendants in support of defendants' motion for summary judgment [4:94-cv-03466] (mh) [Entry date 03/02/98]
2/27/98	117	DECLARATION by R. Joseph Sher on behalf of defendants in support of the supplemental reply memorandum [116-1] [4:94-cv-03466] (mh) [Entry date 03/02/98]

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
5/15/98	119	ORDER by Judge D. L. Jensen GRANTING IN PART & DENYING IN PART Defendant Saucier's motion for summary judgment & GRANTS Defendants Mallory & Lee's motion for summary judgment (Date Entered: 5/20/98) (cc: all counsel) [4:94-cv-03466] (mh) [Entry date 05/20/98]
5/15/98	120	JUDGMENT: by Judge D. L. Jensen Judgment is hereby entered in favor of Defendant, Major Corbin Lee & against Plaintiffs, Elliot M. Katz & In Defense of Animals (Date Entered: 5/20/98) (cc: all counsel) [4:94-cv-03466] (mh) [Entry date 05/20/98]
5/15/98	121	JUDGMENT: by Judge D. L. Jensen Judgment is hereby entered in favor of Defendant, General Glynn C. Mallory &

DATE	DOCKET NUMBER	PROCEEDINGS
		against Plaintiffs, Elliot M. Katz & In Defense of Animals (Date Entered: 5/20/98) (cc: all counsel) [4:94-cv-03466] (mh) [Entry date 05/20/98]
6/15/98	122	NOTICE OF APPEAL by Plaintiff Elliot M. Katz, Plaintiff In Defense of Animal from Dist. Court re order [105-1], decision order [119-1], judgment [120-2], judgment [121-2]; Appeal Fee status PAID [4:94-cv-03466] (mh) [Entry date 06/16/98] [Edit date 06/16/98]
		* * * * *
6/22/98	—	NOTIFICATION by Circuit Court of Appellate Docket Number #98-16121 for the Appeal filed on 6/15/98 [4:94-cv-03466] (mh) [Entry date 06/22/98]
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
7/13/98	127	ORDER by Judge D. L. Jensen Judgment is hereby entered in favor of Major Corbin Lee & against Elliot M. Katz & In Defense of Animals, pursuant to FRCivP 54(b) (Date Entered: 7/15/98) (cc: all counsel) [4:94-cv-03466] (mh) [Entry date 07/15/98]
7/14/98	—	NOTICE OF APPEAL by defendant from Dist. Court decision order [119-2]; Fee status PAID [4:94-cv-03466] (scu) [Entry date 07/14/98]
		* * * * *
7/14/98	128	ORDER by Judge D. L. Jensen Judgment is hereby entered in favor of defendant General Glynn C. Mallory & against plaintiffs, Elliot M. Katz & In Defense of Animals, pursuant to FRCivP 54(c) (Date Entered: 7/16/98) (cc: all counsel) [4:94-cv-03466] (mh) [Entry date 07/16/98]

DATE	DOCKET NUMBER	PROCEEDINGS
7/22/98	—	NOTIFICATION by Circuit Court of Appellate Docket Number #98-16298 [4:94-cv-03466] (mh) [Entry date 07/22/98]
		* * * * *
9/22/98	131	COPY of USCA Order: granting Defendants' motion to dismiss appeal [4:94-cv-03466] (mh) [Entry date 09/22/98]
11/19/98	132	CERTIFIED COPY of USCA Mandate Order: dismissing the appeal [122-1] [4:94-cv-03466] (mh) [Entry date 11/19/98]
		* * * * *
1/20/00	137	CERTIFIED COPY of USCA Order: affirming the decision of the District Court [122-1] [4:94-cv-03466] (rl) [Entry date 01/21/00]
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. 94-3466 DLJ

ELLIOT M. KATZ AND
IN DEFENSE OF ANIMALS, PLAINTIFFS,

vs.

THE UNITED STATES OF AMERICA,
MAJOR CORBIN LEE, SERGEANT
STEVEN PARKER, PRIVATE DONALD
SAUCIER, GENERAL GLYNN C. MALLORY, JR.;
BRIAN O'NEILL, AND DOES 1 THROUGH X,
INCLUSIVE, DEFENDANTS

DEPOSITION OF ELLIOT KATZ

June 2, 1997

* * * * *

[31]

Q. Did you walk from the parking lot to wherever the event was going to take place?

A. Yes.

[32]

Q. Was there set up any kind of seating area or other area for the public to see the events?

A. Yes.

Q. Was it a seating area?

A. Yes.

Q. Did you find a seat?

A. Yes.

Q. In the front row?

A. Eventually.

Q. Did it take some time to get a seat in the front row?

A. Yes.

Q. And was it your intention to do that as part of preparing for your public display of your banner?

A. I think that gave me more accessibility to be in the front row.

Q. Where was the banner?

A. I was holding it in my jacket.

Q. How were you dressed on that day?

A. I don't recall. I know I had a jacket, but I don't know whether I was wearing a sport jacket or a jacket with a zipper. I don't recall.

Q. And the banner was underneath the jacket?

A. Yes.

* * * * *

[33]

Q. How long after the events started did you begin to take out your banner?

A. I don't—I took it out, as I recall, while Vice President Gore was speaking, and I don't remember—I think—I'm pretty sure there was—there were other speakers that preceded him, but . . . .

Q. Did you have any difficulty, by the way, walking from the parking lot to the seating area?

* * * * *

[34]

A. Did I have any difficulty? No, I didn't have any difficulty.

Q. In the complaint in this action, it is alleged that you were wearing a foot brace of some kind at that time. Is that correct?

A. Yes.

Q. What kind of foot brace were you wearing?

A. I don't know how to describe it. It was—I had a fractured foot. And so, it was one of these braces that comes up to about here (indicating).

Q. Just below the knee?

A. Up to below the knee. It's a boot. You put your foot—your whole leg goes into it, and then it has straps, and you strap it on.

Q. Would that have gone outside the leg of your trousers if you were wearing long pants?

A. I believe it was inside of the trousers. The boot—you could see there's no shoe. It goes all the way down. But the upper part, I believe, was under my pants.

Q. And you were wearing a regular shoe on the other foot; is that right?

A. Yes.

* * * * *

[35]

Q. Do you recall how long a distance it was from the car to the seating area?

A. Probably 500 feet, maybe. Something like that.

* * * * *

Q. When you decided to take out your banner, what was the first thing you did?

A. I assume I took out the banner. I think I—this is going to be step-by-step. I believe I may have taken out the banner, and sort of maybe [36] held it on my lap closed, because it was folded.

Q. While you were still seated.

A. Yeah.

Q. Then what?

A. Then I stood up, opened the banner up, unfolded the banner, and walked to the barrier—barriers had been set up—metal barrier, and laid the banner so that the top of it would be on the circular area of the barrier that we set up, and then it would fall down and open up so it would just be hanging from the barrier.

Q. Was the barrier, as you recall it, sort of a bicycle rack kind of thing, or was it a snow fence kind of thing, or—

A. It was a bicycle rack kind of a thing.

MR. BOYD: How high? May I ask how high it was?

MR. SHER: Q. That was the next question. So, sure. Go ahead.

A. Probably—I don't know. Maybe three and a half, four feet, or something like that.

Q. Higher than waist height?

A. Probably that's about where it was.

* * * * *

[37]

Q. * * * How far was your seat from the barrier? Two steps, three steps, one step? Were your knees crushed against it?

A. I think it was probably about—I don't know. Maybe—it's a guess. I don't recall. Approximately from maybe here to this wall. Maybe about four feet. Something like that, I would think.

Q. Couple of strides?

A. Yeah. I think so.

Q. What's the next thing that happened after you got the banner over the fence?

A. Let's see. Somebody grabbed me from behind, and somebody else tore the banner away.

Q. Did either of those individuals say anything to you?

A. I don't believe so.

Q. The one who grabbed you from behind, did his arms go around your body?

A. I believe so.

Q. What happened next?

* * * Do you recall what either of these individuals looked like?

A. No. I was facing out and holding the thing [38] like this (demonstrating). Basically, I just held the banner in place so that Vice President Gore could see it, as well as give it a chance to unfold itself, because it never really, I don't believe, totally unfolded. Before it unfolded—this thing happened real quick. So, I think it unfolded maybe half down, or something like that. And then I just held it in place while I think they had their arms around me, or one of them had their arms around me.

Then when the—then I think each one of them took an arm, and they sort of started sort of picking me up

and kind of walking me out, kind of like very hurriedly, sort of like the bum's rush: Let's get this guy out of here.

Q. Did you try to prevent the banner from being taken away from the railing, taken off the railing?

A. It happened so quickly, I don't—I think I did, but it got pulled away real quick.

Q. And do I understand you to say you had one of these individuals on either side of you, I guess is the way to put that?

A. Yeah.

Q. Holding your arm?

[39]

A. I think—yeah. That's the way it ended up as I was being taken out. I think initially one grabbed me, and then they each took an arm and sort of carried me—half carried me—mostly carried me walking out.

Q. Did they say anything to you?

A. I don't believe so.

Q. Did you say anything to them?

A. I think I may have said something like "Careful," or something like that, but I don't recall exactly.

Q. Did you make any effort to slow them down; resist them in any way?

A. No. My feet were barely touching the ground.

Q. Did you make any effort to get your feet on the ground?

A. No. I couldn't. I was being held up in the air, sort of.

Q. Did there come a time when they put you down?

A. I don't know whether—again, my legs were sort of, at this point, together hitting the ground, but not enough to really be firmly planted. I never, I don't think—again, I was sort of being [40] carried out, in a way. I don't think I was ever put down I think it was all one thing, being kind of carried out.

Q. And where did they carry you to?

A. To the back—there was the seating area. So, they took me along in this—where—there was this little pathway along the seating area. And there was a vehicle, a van, a military police van, that they took me to.

* * * * *

Q. And when you got to the vehicle, what happened?

A. They pretty much threw me in. Just shoved me in.

Q. Did you attempt not to get put in?

A. No.

Q. Did you put your feet on the vehicle in any way?

A. I think I probably—I can't remember. I think I likely—my feet, when I was being put in, I think my feet touched the entrance to the truck. [41] I don't know if it was the bumper.

Then I was shoved.

Q. Do you recall whether it was a back entrance or a side entrance to the vehicle?

A. I'm pretty sure it was a back entrance.

Q. Were there seats in the vehicle?

A. I believe there were seats along the side. I think so.

Q. Did you sit down, then, in one of them?

A. Eventually.

Q. Eventually?

A. Yeah.

Q. When you were, as you say, shoved into the vehicle, did you fall down?

A. Yeah.

Q. Full length on the floor of the vehicle?

A. No. I managed to kind of prevent myself from—as it was happening, it was like flashing that I was—my head was going to smash down, or I was going to go full length into—with my head going into the end of the van, and I was able to stop the downward and the

forward motion by just catching myself so that I didn't smash myself.

Q. Do you recall what you caught yourself on?

A. It took a great deal of effort to prevent [42] myself from getting seriously hurt.

Q. Do you recall what you caught yourself on? That is, was it a seat back, a seat—

A. I think it was the floor.

Q. Then what happened? Did you seat yourself at that point?

A. I think I sat myself at that point.

Q. Did anybody speak to you?

A. I don't think so. I think they closed the door.

Q. So, you don't recall speaking to anybody, either, at that point.

A. No.

* * * * *

[43]

Q. What happened when you got the MP station?

A. They took us out and set us down on a [44] bench, I think, inside—I'm pretty sure I remember sitting on a bench inside one of the waiting rooms, and I don't really remember too much what transpired, whether they talked to us or whether they took

fingerprints. I don't think they even did anything. I can't remember.

Q. And there came a time, ultimately, when you left, obviously, since you're not still there.

A. Yeah. They put us—I think they put us back in the same van, and then took us to a parking lot over by the edge of the Presidio and let us out.

* * * * *

Q. What did you do after you got to the parking lot?

[45]

A. I don't recall that, either.

Q. Was it the parking lot where you had left your car?

A. No; no. I don't—it's vague. It's almost like it's after the fact. I mean, that whole thing was so traumatic, that whole thing of being, you know, carried, and then thrown in the van, shoved in, that it's sort of like—that's where my recollection almost ends. I was so close to getting so—almost severely hurt, that it's almost like I just kept thinking about that, going over it in my mind, that shove, and how I managed not to really get severely hurt, that I don't—sort of like everything else is almost after the fact. I don't have any recollection of what took place after that, whether somebody drove us back from the parking lot or—I don't know.

Q. Ultimately you returned to your car?

A. Apparently.

Q. Apparently. And drove home, I guess.

A. Yeah.

* * * * *

[67]

MR. SHER: Q. Calling your attention back to the first day, the 24th, the day that you were apprehended by the military police, at any time prior to your getting up and displaying your banner, did you talk to any of the military police personnel?

A. I don't recall. I don't think so, but I don't recall.

Q. Do you recall anybody talking to you about whether or not you planned to conduct any expressive activities prior to that event?

A. I don't recall. I believe some of my—one or two of my staff might have. And in terms of—because they were people who were wanting to be distributing flyers, or something, on the site, and they were asked to go off base. And so—which they did. So, they stood at the entrance of one of the gates.

So, I think the Army or the Park was dealing with somebody else, as opposed to me, that day.

Q. Were you aware of that before the events on the 24th?

[68]

A. Yeah. I believe so. That they didn't want them distributing brochures. Yeah.

Q. Did you seek any medical care after your apprehension?

A. No, I don't believe so.

* * * * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. 94-3466 DLJ

ELLIOT M. KATZ AND
IN DEFENSE OF ANIMALS, PLAINTIFFS

vs.

THE UNITED STATES OF AMERICA,
MAJOR CORBIN LEE, SERGEANT
STEVEN PARKER, PRIVATE DONALD
SAUCIER, GENERAL GLYNN C. MALLORY, JR.;
BRIAN O'NEILL, AND DOES 1 THROUGH X,
INCLUSIVE, DEFENDANTS

DEPOSITION OF DONALD SAUCIER

TUESDAY, MAY 13, 1997

* * * * *

[7]

Q. Now, as I understand it, out at the Presidio you were in the military police; is that right?

A. That's correct, sir.

* * * * *

[10]

Q. Okay. Well, what was your understanding as to the military base there, or at the Presidio, generally, were people allowed to come onto the base?

A. They were allowed to come on the base, but they weren't allowed to come on the base and protest, make us look like fools in front of high-ranking people.

Q. And why do you say they weren't allowed to do that?

A. Because it makes the army look bad. And myself, personally, I don't feel it's right either.

Q. And why don't you feel that it's right?

A. Like I said, I guess it just makes us look bad if we let people come on the post and let them protest and do what they want, sir.

[11]

Q. So do you recall a person being arrested at the day of the public event at the Presidio when Vice President Gore and others were there?

A. Do I recall? Yes, sir.

Q. Was that person being arrested because they were engaged in this First Amendment activity that they shouldn't be doing?

A. As regards to passing out leaflets, no. [B]ut what he did at, you know, the end of the Vice President's speech was wrong—unauthorized. You

know, I was given an order not to let any person, not just that person, but any person do that.

Q. Okay. What did he do?

A. He got up and started—towards the end of the Vice President's speech, he got up and started to, you know, drawing attention to himself and waving a banner.

Q. Okay. What did the banner say on it? Do you know?

A. I can't recall exactly what it had on it, sir, but it had something to do with animal rights.

Q. It was your understanding that that activity was prohibited?

A. That's correct, sir.

Q. Is that why you helped take him into custody?

[12]

A. Yes, sir. Just following my orders, sir.

* * * * *

Q. Now, at the time that you approached Dr. Katz, did he have the banner already out and he was holding it?

A. Yes, sir.

Q. Did you say anything to him?

A. I said nothing, sir.

Q. Did you hear Sergeant Parker say anything to him?

A. No, I didn't, sir.

Q. Did you approach Dr. Katz at the same time that Sergeant Parker did?

A. About the same time, sir.

[13]

Q. So when Sergeant Parker approached, Dr. Katz's banner was already out?

A. Yes, sir.

Q. And did you hear Sergeant Parker say anything to Dr. Katz?

A. Not that I recall, sir.

Q. And do you recall whether are not Dr. Katz said anything?

A. He said some stuff, sir, that I can't recall exactly what he was saying. You know, pretty much in a fuzz.

Q. Did he say anything regarding his First Amendment right to convey his message?

A. I can't remember, sir.

Q. Okay. But was he talking about his right to communicate, just generally?

A. Like I said, sir, I can't exactly remember what he was saying.

Q. So do you recall that you and Sergeant Parker took him into custody?

A. Yes, sir.

Q. Did you take the banner away from him?

A. Yes, sir.

Q. Who took the banner away from him?

A. It wasn't me. It had to have been Sergeant Parker. Sergeant Parker or one of the other [14] patrolmen that were on that day.

* * * * *

Q. [W]hen you took Dr. Katz into custody, did you physically escort him away from where he was?

A. Yes, sir.

Q. Did you take a look at him as you were escorting him?

A. Did I take a look at him, sir?

Q. Yeah.

A. I'm sure I probably glanced at him, sir.

Q. Did you see that he was an elderly man?

A. Oh, I noticed him before we even—because he was pointed out as one of the potential, you know, activists. So we pretty much had a heads-up on him, sir.

Q. Who pointed him out?

A. When he first arrived, Sergeant Parker let me know exactly who this person was, and there was a couple of people with him.

[15]

Q. And what did Parker say about that?

A. He didn't really say much. "That's the person we need to keep an eye on," basically.

Q. And did he say why?

A. Because it was put out that he might be—by Major Lee—that he might be a possible activist at the function because he would be seeking attention because it would be televised.

Q. I see. And it was understood that he should not be allowed to raise attention; is that right?

A. That's correct, sir.

Q. So then, once you escorted Dr. Katz away from where he was, do you recall taking him to a military vehicle?

A. Yes, sir.

Q. And where was that vehicle?

A. That was located in the rear of the seating area, sir.

Q. What was the purpose of that vehicle?

A. That vehicle was for anybody—anyone at all. It didn't necessarily have to be Dr. Katz. Anybody that became unruly and decided to act out.

Q. So it was there—in addition to keeping an eye on people, you had a vehicle there in case you needed to take them away for violating rules; is that [16] it?

A. That's correct, sir.

Q. So you knew where to take Dr. Katz?

A. I wasn't the driver of the vehicle, sir.

Q. Right.

A. I was just escorting that person to the vehicle.

Q. Right. But you and Sergeant Parker already knew where you going to take him once you got him in custody?

A. Right, sir.

Q. You were taking him to that vehicle?

A. Right, sir.

Q. Because it was understood ahead of time that if you did take Katz or one of these other activists into custody, you take them to the vehicle?

A. That's correct, sir.

Q. So then you took him to the vehicle. Did he resist you?

A. Yes, he did, sir.

Q. Did he try to hit you?

A. Negative, sir. He tried to keep himself anchored at the front of the seating area.

Q. Okay. He said he wanted to stay?

A. I don't know if he said he wanted to stay, but he definitely wanted to stay.

[17]

Q. Then after you—but you removed him from that seating area?

A. Yes, sir.

Q. Then you escorted him up to the van?

A. That's correct, sir.

Q. When you were escorting him, was he walking on his own?

A. I wasn't fully carrying him, you know, because I only had him by his left arm.

Q. So he was partly walking on his own?

A. That's right, sir.

Q. Did you see that he had a splint on his foot?

A. I don't remember, sir.

Q. Did you look for that?

A. Did I look for it, sir?

Q. Yeah.

A. I can't remember if I did or not.

Q. Did anyone pat him down?

A. Before putting him in the vehicle, sir?

Q. Yeah.

A. No, sir. He was kind of like unstable. He didn't really want to go into the van at all. So he didn't even want to be taken to the van, so—

Q. And did you have any conversation with him before you got to the van?

[18]

A. No, sir.

Q. And then once you got to the van, did you put him into the van?

A. Did I put him in personally? I assisted putting him in the van.

Q. Okay. And you were assisting Sergeant Parker?

A. Yes, sir.

Q. Is it fair to say that you both put him into the van together?

A. Yes, sir.

Q. And did you push him as you put him into the van?

A. When we first brought him back to the van, he resisted getting into the van by sticking his legs up on

the bumper and pushing away. So we had to use our heads putting him in the back of the vehicle.

Q. So are you saying that there was a period of time when you were stopped behind the back of the van and he was refusing to get into it?

A. Yes, sir.

Q. And did you talk to him about why you were putting him into the van?

A. No, sir.

Q. Did you talk to Sergeant Parker about whether or not he should be put into the van before [19] you put him in the van?

A. Negative, sir.

Q. Did Sergeant Parker push him into the van?

A. Did he push him in the van, sir?

Q. Right.

A. He assisted him into the van, sir. He didn't push him into the van, like, you know, like out of anger.

Q. So you would say that the two of you just assisted Dr. Katz, is that it?

A. That's correct, sir.

Q. And you think that assistance was the appropriate amount of force that was needed?

A. Yes, sir.

Q. Do you think Dr. Katz was a physical threat to you?

A. Any person can be a physical threat, sir.

Q. How tall are you, private Saucier?

A. I'm 6' 3", sir.

* * * * *

[20]

Q. So at the time of the arrest, what was your understanding about what would happen with [21] Dr. Katz once he was placed in the van?

A. He was going to be taken back to the station and be processed just like any other person would, sir.

Q. Processed for committing a crime?

A. Yes, sir.

Q. And what crime would that be?

A. That would be, you know, disobeying post regulations, sir, by not allowed to, you know, have any type of protesting on post of any type, sir.

Q. Does that depend on the circumstance that there are dignitaries present?

A. No, sir.

Q. It's always the same rule?

A. Yes, sir.

* * * * *

[22]

Q. Do you know what happened with the van [23] after Dr. Katz was put into it?

A. No, sir. I returned right to my position.

* * * * *

[24]

Q. And you feel that you used the minimum required with Dr. Katz?

A. Definitely.

Q. No question?

A. No questions.

Q. Have you watched the videotape that was sent to you?

A. Yes, I did, sir.

Q. Did you look at it closely?

A. Yes, sir.

Q. Are you the person that appears on the left-hand side of the video when Dr. Katz is being put in the van?

A. Yes, sir.

Q. Do you wear glasses, Specialist?

A. Not anymore. I wear contacts now, but I did then.

[25]

Q. So you were wearing glasses that day?

A. Yes, sir.

Q. Do you recognize yourself in that video?

A. Yes, sir.

Q. Do you recognize Dr. Katz?

A. Yes, sir.

Q. That's Dr. Katz that was being put into the van by the two of you, right?

A. Yes, sir.

* * * * *

Q. Do you recall there being a meeting to prepare for the public event that would be attended [26] by Gore, Feinstein and the others?

A. Yes, sir. * * * [W]e had the people that were going to be on duty working the details. * * * Major Lee gave us, you know, our operations orders, knew exactly what we were supposed to do.

Q. Did he discuss with you what you were supposed to do with respect to First Amendment activity.

A. In regards to anybody, you know, protesting or —yes.

* * * * *

Q. Right. And what did he say?

A. He told us exactly how to handle the situation. We didn't want to draw that much attention if we didn't have to. We just wanted to, you know, diffuse the situation if it arises.

Q. Get him into the van as quickly as possible then?

[27]

A. Right.

* * * * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. 94-3466 DLJ

ELLIOT M. KATZ AND
IN DEFENSE OF ANIMALS, PLAINTIFFS

vs.

THE UNITED STATES OF AMERICA,
MAJOR CORBIN LEE, SERGEANT
STEVEN PARKER, PRIVATE DONALD
SAUCIER, GENERAL GLYNN C. MALLORY, JR.;
BRIAN O'NEILL, AND DOES 1 THROUGH X,
INCLUSIVE, DEFENDANTS

DEPOSITION OF STEVEN PARKER

TUESDAY, MAY 13, 1997

* * * * *

[23]

Q. * * * What was your understanding, Sergeant, of the First Amendment right of citizens in San Francisco to engage in activities such as leafleting at the Presidio?

A. And was is leafleting?

Q. Like passing out leaflets regarding political issues.

A. My understanding is that while on a military installation, people are not entitled to freedom of speech, a First Amendment right.

Q. And does that understanding change if the base has been opened up for a big public event where, say, Vice President Gore and Diane Feinstein and other people are present?

A. No, not to my knowledge.

* * * * *

[31]

Q. Well, was it your understanding at the time of the public event that if people engaged in First Amendment activity that they were to be arrested?

A. Yes.

Q. And was that based upon the instructions given to you by your superiors?

A. As in instructions given, I don't remember back then what they said and what they didn't say.

Q. But I assume that your understanding that people should be arrested was based upon the orders that you had been given from your superiors?

A. Yes, sir.

Q. Now, what order, specifically, can you recall that led you to believe that?

A. During the presentation, if being on a military installation, the personnel there were not given an

opportunity for free speech because of them being on a military installation.

* * * * *

[37]

Q. And did it look to you to be—go ahead and describe for me the size of crowd, would you?

A. Large, sir. I mean, I couldn't put a number figure on it. I don't know. I don't have a clue, sir.

Q. And at the time of the event, do you recall at some point that you made an arrest?

A. I apprehended someone, sir.

Q. Can you tell me what caused you to apprehend somebody?

A. An individual running towards the barricade.

Q. Okay. And how fast was he running?

A. I don't know. I turned around—I don't know how fast he was running, sir.

Q. And can you tell me what you did?

A. As soon as I saw an individual get up and [38] go towards the barricade, I went right behind him. And he reached into his jacket, and I didn't know what it was, so I took my arms and put them around the individual.

Q. Well, did you see him take out a banner?

A. No, sir.

Q. Did you take a banner away from him at some point?

A. I did not take a banner. Not that I remember, sir.

Q. Was there anyone else with you at that time that you approached him?

A. I don't remember, sir.

Q. Well, do you recall—what was your specific duty that day at the public event, Sergeant?

A. I was in a seating area just ensuring that everyone had a good time, sir.

Q. Okay. And where there other people that were working with you that day in the seating area?

A. Yes, sir.

Q. Who was working with you in the seating area?

A. The people I can remember was a Saucier and Barbary, if those names are correct. I don't know if they are pronounced correct. Those are the two that I remember.

* * * * *

[42]

Q. Let me be more specific, Sergeant. You said that you approached someone who you saw moving, right?

A. Yes, sir.

Q. When you approached him, did you see that he was an elderly gentleman?

A. No, sir.

Q. Did you look at him?

A. No, sir.

Q. Did you talk to him?

A. At what time, sir?

Q. When you first approached him, did you say anything to him?

A. I don't remember, sir.

Q. Do you think that you said anything to him?

A. I don't remember, sir.

Q. Well, did you immediately take him into custody?

A. What I remember doing is trying to get his hands off the bar.

Q. Okay. Tell me what happened, please.

A. As I approached him, like I said, he was reaching into his jacket. I don't know what he was [43] grabbing for. I put my arms around him, and he put both his arms onto the barricade. And I was trying to pull him up away from the barricade, and he wasn't letting go.

And I don't know, I don't remember if any conversation took place or not.

Q. Well, based on your training, if you are going to take someone into custody, do you need to talk to them first in a situation such as that?

A. Under the circumstances that was going on at the Presidio, the people speaking there, I would say that the safety of the Vice President and the personnel there were—was my job to ensure that if this individual was trying to do something, pull a gun out or anything like that, I was there to ensure that that did not happen. And in speaking to him at that particular time, I do not remember.

Q. Well, did you see a banner in his hands when you approached him?

MR. SHER: Go ahead, Sergeant.

THE WITNESS: No, sir.

MR. BOYD: Q. Do you recall whether or not, after you reached him, if you saw a banner at any time?

A. No, sir.

Q. And had he started to unfurl a banner, would you have considered that to be First Amendment [44] activity?

A. At that time, with him running to or rushing to the barricade, I did not know what he was doing. To speculate and see that coming out, I don't know what my reaction would have been at that time.

Q. Did anyone go with you when you approached him?

* * * * *

A. I think that I arrived there first. And then another—I think it was PFC Saucier helped get him off the barricades.

* * * * *

[46]

Q. Did you give Dr. Katz any kind of a warning that he had to stop what he was doing?

A. Did I give him any type of warning? Meaning once he was on the barricade and I was behind him, there wasn't time. Is that what you mean, sir?

Q. At any time, did you give him any warning that he needed to stop what he was doing?

A. Not that I remember, sir, no.

Q. Did you pat him down to feel if he had any weapons?

A. I don't remember, sir.

Q. You said that you grabbed him; is that right?

A. I put my arms around the gentlemen, sir.

Q. Okay. Can you describe how you did that?

A. Like I said, he was in front of the barricade reaching inside his jacket. I took both my arms and put them around him. And what I assumed happened next is he took his hands and put them onto the barricade. And I was trying to pull him off the barricade. And that's when Saucier approached to try to help me too.

Q. Okay. What happened next?

A. We both got him off the barricade, and we escorted him back—we escorted him back approximately 50 yards at that time.

[47]

Q. Did he try to hit you?

A. I don't remember, sir.

Q. Do you recall him making any blow against either you or Private Saucier?

A. I remember him not coming with us, as in a sense that he—you think you have someone and they would just walk along with you. I don't remember that I remember me actually taking him back against his will.

Q. Do you recall looking at his foot to see if he had crutches?

A. No, sir.

Q. Do you recall seeing whether or not he had a cast on his foot?

A. No, sir.

Q. Do you recall seeing whether he had a splint on his foot?

A. No, sir.

Q. Did Dr. Katz overpower you at any time?

A. No, sir.

Q. And at any time did you think he was physically a danger to you?

A. I'd say as I went up to the barricade and he was there and I put my arms around him and he did not come, he clenched onto the bars, at that time he could have been a danger to a lot of different people.

[48]

Q. But once you had a hold of him, was he of any physical danger to you?

A. I don't know, sir.

Q. Well, did you look?

A. He could have gotten loose and possibly have a weapon. He could have been a danger to me.

Q. Did you feel any object that made you feel he had a weapon?

A. I didn't search him or anything. I was basically just doing my job to get him back and to the area where we were putting him at. And at which time—it went so fast. I just had my arms around him trying to get him back there. I did not know what he had.

* * * * *

MR. BOYD: Q. Well, was one of the things you [49] were doing there watching to make sure that nobody engaged in First Amendment activities?

A. I was there to ensure that everybody, you know, just came and sat down, had a good time, enjoyed the

Vice President speaking, anyone else that was going to speak and enjoy the day.

Q. As long as they didn't give any handbills or anything like that, right?

A. Well, it was a ceremony for the park, for the Presidio to be a park. So I would assume that people came there to enjoy the day and just enjoy people speaking there, get an opportunity to see the Vice President.

Q. And that was your understanding of the topics of the day were regarding this transition from a military base to a park?

A. Yes, sir.

* * * * *

[50]

Q. So when did you actually—strike that. Let me ask it a little cleaner here. Sergeant, did you physically carry Dr. Katz away from the seating area?

A. Physically carry?

Q. Yeah.

A. What did you mean by that?

Q. I mean did you and Private Saucier lift Dr. Katz off the ground in order to carry him away from the seating area?

A. What I remember is, like I said, him rushing to the barricade, putting my arms around him and trying

to get him to let go of the barricade. And it took another soldier to help me. And then taking him back to the area. As in picking him up and carrying him, I don't remember.

Q. Well, when you we were escorting him back to the area, was he walking?

A. I don't remember, sir.

[51]

Q. Do you recall if there was anyone else besides Private Saucier that was helping to escort Dr. Katz away from the seating area?

A. Not that I remember, sir.

Q. And when you escorted him away from the seating area, where did you take Dr. Katz?

A. I took him to a vehicle approximately 20 feet behind the seating area.

* * * * *

Q. Well, did you put Dr. Katz into that vehicle?

A. Yes, sir.

Q. Okay, did anyone help you to put Dr. Katz into that vehicle?

A. Saucier helped me.

* * * * *

[52]

Q. Okay. And does Saucier wear glasses?

A. Yes, he does.

* * * * *

[54]

Q. Did you receive any training at any time about how much force you should use when you take someone into custody?

A. Not that I can remember, sir.

Q. Do you recall ever receiving any training at the Presidio as to the amount of force that is [55] appropriate when you take someone into custody?

A. Yes, sir.

Q. What training did you receive?

A. The use of force—use minimal force to take care of the situation.

Q. And did you feel you used minimum force necessary with Dr. Katz when you put him in the van?

A. Yes.

Q. Do you feel that you complied with the training and policy of the Presidio military police when you put him into the van?

A. Yes, sir.

Q. Did anyone from the—any of your superiors at the Presidio ever tell you that you used an excessive amount of force when you put Dr. Katz into van?

A. No, sir.

Q. Have you ever received any discipline for using excessive force at any time in the military?

A. No, sir.

Q. Did you ever receive any discipline for the way you handled taking Dr. Katz into custody that day?

A. No, sir.

* * * * *

[57]

Q. Did you view a videotape of the placement of Dr. Katz into the van, Sergeant Parker?

A. Yes, sir.

Q. Did you look at that videotape closely?

A. Yes, sir.

Q. And do you recognize yourself in the videotape?

A. Yes, sir.

Q. And do you recognize Private Saucier in [58] the videotape?

A. Yes, sir.

Q. And you the gentlemen that was to the right-hand side when the two of you were putting Dr. Katz into the van?

A. Yes, sir.

Q. Do you recall pushing Dr. Katz as you put him into the van?

A. No, sir.

Q. Do you recall Private Saucier pushing Dr. Katz as he was put into the van?

A. No, sir.

Q. Do you know what happened to the van after Dr. Katz was put into it?

A. No, sir.

Q. What was your understanding of what was to happen with Dr. Katz?

A. My understanding was that he was going to be taken down to the MP station. And from there the personnel down there would do what they were going to do.

* * * * *

[59]

Q. And you took him into custody without telling him that he had committed any crime, is that right?

A. I took him into custody or I got him out [60] of the area due to the fact of what he did, being rushed the

barricade and trying to get something, pull something out of his jacket. Not knowing what that was—I did what I had to do. And at that time—

Q. But you never asked him what he was doing before putting him in the van, did you?

A. There was no time to do that, sir.

* * * * *

[62]

MR.BOYD: Q. But you never talked to Dr. Katz, did you?

A. There wasn't an opportunity to talk to Dr. Katz.

* * * * *

Q. How tall are you, Sergeant?

A. I'm about 6' 2".

Q. How much to you weigh?

A. 215 pounds.

Q Do you work out with weights?

A. Yes, sir.

Q. How frequently?

A. Lately, not much, sir.

Q. What do you bench, Sergeant, about 310?

A. No, sir. I would say maybe like 260.

Q. How about when you were out at the Presidio, did you bench about 260 at that time, too?

A. I don't remember, sir. I think I was in better shape at the Presidio, sir.

* * * * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C 94 3466 DLJ

ELLIOT M. KATZ AND
IN DEFENSE OF ANIMALS, PLAINTIFFS

vs.

THE UNITED STATES OF AMERICA,
MAJOR CORBIN LEE, SERGEANT
STEVEN PARKER, PRIVATE DONALD
SAUCIER, GENERAL GLYNN C. MALLORY, JR.;
BRIAN O'NEILL, AND DOES 1 THROUGH X,
INCLUSIVE, DEFENDANTS

DEPOSITION OF CORBIN R. LEE

JUNE 3, 1997

* * * * *

[18]

Q. * * * In either one of those [courses], did you have any discussions about how to handle First Amendment activities on a military base?

A. There was very limited discussions on First Amendment activities on military installations, because on military installations, with federal exclusive jurisdiction, there is no political [19] activities allowed.

Q. Can that depend on whether or not the base is opened up to the public for particular events?

A. Military installations are open up during the year for numerous type of events in which the public is not only allowed on but it is open to the public, but it is for special events such as ceremonies that are conducted, graduations, and Fourth of July celebrations, national celebrations.

They're not politically—it's not politically involved. It's not military—and it's extremely important, and all officers are trained in fact, that the military must remain neutral in a democratic society. And so regardless of what our personal political feelings are, it's not to be vented in public forums.

* * * * *

[20]

Q. So is it your understanding, then, that under no circumstances can the public engage in First Amendment activities on a military base regardless of the type of the event that's being held there?

A. It is my understanding, on a military installation, which is federally exclusive jurisdiction, that it is not used and the grounds of the military installation is not used for political purposes.

* * * * *

[24]

Q. * * * So isn't it true that you gave [Saucier] those orders, that they were to arrest people if people were engaged in First Amendment activities such as leafleting?

A. No, I don't remember telling him or anyone else that they are to arrest people.

The instructions that I remember, which was coordinated with United States Army JAG personnel, Sixth United States Army, was that protest, be it of a political nature, is not allowed on military installations, which is federally exclusive jurisdiction.

[25]

There was a fact sheet that was drafted up by Army JAG explaining in detail to anyone who wished to engage in protest activities on a military installation that it was not allowed and why it was not allowed.

As I recall, there was no intelligence information during the time leading up to these events or at the event that there was any group that wished to come on the military installation and protest anything.

* * * * *

However, during a briefing in preparation for deployment, it was probably covered, if not by myself, one of my noncommission officers in charge of the event with me, discussing, in the event if there is a protest, these written fact sheets would be given to the individuals who wanted to engage in such activities to explain to them that it is not allowed and why it is not allowed.

* * * * *

[31]

Q. Can you tell me how you have this understanding that Dr. Katz was spoken with before the events on the videotape?

A. My understanding, when this particular group wanted to come on to the Presidio, that a Staff Sergeant Reed, one of my noncommission officers in charge, alerted me to the fact that they were at the entrance to the Presidio wantin' to come on and possibly engage in protest activities for some type of animal rights organization.

* * * * *

I directed Staff Sergeant Reed, through another noncommission officer of mine, to report back to the Provost Marshal office and to obtain fact sheets, which clearly explain the nature of a federal [32] installation, exclusive federal jurisdiction, and that protest activities are not allowed because it's politically neutral.

He reported back to the Provost Marshal office, obtained the materials, and reported back to the Presidio gate in which this animal rights organization was at, and handed out fliers.

I do not know specifically if he talked to Dr. Katz. All I know is that he talked to the entire group as a whole and fliers were handed out to each group.

My understanding is that a leader of the group talked with the noncommission officer in charge, Staff Sergeant Reed, and agreed that they just wanted to come on to the installation and engage in the activities and

the ceremony that was being presented, to listen to Vice President Gore speak and see the facilities.

They stated, according to Staff Sergeant Reed, they understood the parameters involved with political protest on a federal military installation; they had [33] received the written documentation, and they understood that; they understood that banners were not allowed because of the nature of the event and the Vice President speaking and it was politically neutral, and they requested to come on.

And I did not think this was a problem. I did not think there was a problem with the group. From my monitoring the radio, it sounded like it was a very minor situation, and we more than happily welcomed the group on with the rest of the general public to come and attend the events.

* * * * *

[43]

Q. So what conversation do you recall there being with these people that were involved at the time that Dr. Katz was taken into custody and escorted to the van?

A. I recall—and I believe it was Sergeant First Class Tony Bordigan who was reporting this to the command post—that, once again, members of—once again, individuals—at this time I don't even think that it was understood that it was an animal rights group or what the group was. It was a group that believed in animal rights, I guess—and that, once again, they had

violated the instructions of the military police, and I believe this was the fourth or fifth time.

My understanding was that although they were giving them fliers at the front gate that explained it to them and they agreed to it, that when they came on to the installation and they were in place where they were going to witness Vice President [44] Gore's speech, that at one point they came out with a banner in which they were asked to please put it away because it wasn't allowed, and they did that.

* * * * *

I believe there was a third attempt in which a banner was attempted to be pulled out, and an MP, going really beyond what he should have, just allowed them to—just reminded them, "This is not allowed," and they—"Okay, okay," agreed to it, whoever these individuals were.

And I believe the last attempt that led up to the escorting of Dr. Katz off the premises was when they [45] unfolded the banner and the two MP's walked up to him and took the banner down from either side and asked him to please follow them, and from my recollection is that one MP was on each side of the individual and escorting him by holding his elbows.

* * * * *

[48]

Q. Let me ask it this way: They're supposed to diffuse the situation, [49] right, if somebody did something like take out a banner; is that correct?

A. They were supposed to diffuse the situation in the way that I've described to you already.

Q. And that included removing that person as quickly as possible?

A. If it came down to that, it would include asking the individual to leave the installation.

Q. And removing them quickly?

A. In this particular instance, yes.

* * * * *

JAN 8 2001

(7)

Supreme Court, U.S.
FILED
JAN 8 2001
OFFICE OF THE CLERK

No. 99-1977

In the Supreme Court of the United States

DONALD SAUCIER, PETITIONER

v.

ELLIOT M. KATZ AND IN DEFENSE OF ANIMALS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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68 pp

QUESTIONS PRESENTED

1. Whether, in a case alleging the use of constitutionally unreasonable force, the test for qualified immunity and the reasonableness test under the Fourth Amendment are identical, such that a finding of unreasonable force under the Fourth Amendment necessarily precludes the officer from being entitled to qualified immunity.

2. Whether the court of appeals erred in concluding that petitioner Saucier's use of force to detain respondent, which consisted of carrying respondent from the crowd to a waiting van and pushing him inside without injuring him, so clearly exceeded the amount of force permitted by the Fourth Amendment as to warrant denial of qualified immunity.

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In the Supreme Court of the United States

No. 99-1977

DONALD SAUCIER, PETITIONER

v.

ELLIOT M. KATZ AND IN DEFENSE OF ANIMALS

ON WRIT OF CERTIORARI TO
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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 194 F.3d 962. The opinions of the district court (Pet. App. 17a-64a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 22, 1999. A petition for rehearing was denied on January 10, 2000 (Pet. App. 65a-66a). On March 30, 2000, and May 1, 2000, Justice O'Connor extended the time within which to file a petition for a writ of certiorari, first to May 9, 2000, and then to June 8, 2000, and the petition was filed on the latter date. This Court granted the petition on November 13, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported

by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.

STATEMENT

Respondent Elliot Katz, an animal rights activist,[1] brought this Fourth Amendment excessive force claim after he was detained at the Presidio military post in San Francisco.[2]

1. On September 24, 1994, Vice President Albert Gore and other speakers gave a special presentation at the Presidio to celebrate the conversion of that facility, which was then an Army base, into a national park the following week. Pet. App. 3a. The public was invited to attend. *Ibid.* Respondent arrived at the Presidio early on the day of the presentation, intending to display a banner protesting possible use of the Letterman Hospital in the Presidio for experimentation involving animals. *Id.* at 3a, 18a. The banner read: "Please Keep Animal Torture Out of Our National Parks." *Id.* at 4a, 19a. Perhaps aware that the Army prohibits the display of protest banners and other political activities at the Presidio and other military bases—respondent testified that he knew that visitors had been asked to leave the Presidio base for engaging in such activities, J.A. 29—respondent kept his banner concealed under his jacket as he entered and walked through the base, J.A. 19.[3]

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[1] The suit was also brought by respondent In Defense of Animals, an organization of which Dr. Katz is president. We use the word "respondent" to refer to respondent Katz alone, except where context indicates otherwise.

[2] The relevant facts are, for the most part, not disputed. Because the case arises on petitioner's motion for summary judgment, any disputed facts should be viewed in the light most favorable to respondent.

[3] Political activities (including political protest, campaigning, and leafleting) have long been prohibited on military bases. This Court has upheld that prohibition as "consistent with" the Nation's "constitutional

Respondent sat down in the front row of the seating area, near the speaker platform; at some point, he claims, he may have removed the banner from under his jacket and held it closed on his lap. J.A. 19, 21; Pet. App. 4a.

During Vice President Gore's speech, respondent moved forward from his seat to the waist-high barrier that separated the spectators from the Vice President and began to unfurl his roughly 4-foot-by-3-foot banner. Pet. App. 4a, 19a, 22a. Respondent placed the banner on the barrier—according to respondent, he "held the banner in place" on the barrier—and began allowing it to unfold. J.A. 23. As he did so, someone "grabbed [respondent] from behind, and somebody else tore the banner away." Pet. App. 4a, 24a. The two individuals were Sergeant Steven Parker and petitioner, then-Private now-Specialist Donald Saucier, who were serving as military police. *Id.* at 4a.[4] When the two saw respondent quickly move from his seat toward the barrier that separated the crowd from the Vice President—Parker testified that he saw respondent "rushing" or "running towards the barricade," J.A. 48, 50, and respondent's seat was only

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tradition of a politically neutral military," because it ensures that "official military activities" remain "wholly free of entanglement with partisan political campaigns," and because it insulates the military "from both the reality and the appearance of acting as a handmaiden for partisan political causes." *Greer* v. *Spock*, 424 U.S. 828, 839 (1976); *United States* v. *Albertini*, 472 U.S. 675, 684-686 (1985) (similar). In this case, Major Corbin Lee testified that the Army circulated fliers to potential protesters, including an animal rights group, explaining that visitors to the base would not be permitted to display banners, handbill, or otherwise protest on the base. J.A. 63-64. See also J.A. 65-66 (indicating that animal rights group had been given fliers and warned of the prohibition several times). Respondent denies receiving such written notification, Pet. App. 19a, but admits being aware of the fact that other visitors to the base had been asked to leave when they attempted to circulate handbills, J.A. 29.

[4] Because Sergeant Parker was never served with the complaint, he is not currently a party to this litigation. See Pet. App. 5a ("[A]t the time of this appeal Parker ha[s] not been served."); *id.* at 38a ("Defendant Parker had not been served and is not before this Court.").

about four feet from the barrier to begin with, J.A. 22-23—they immediately moved to intercept him. There is no allegation that Saucier or Parker hit or struck respondent. Instead, they each took one of respondent's arms and quickly removed him from the seating area. According to respondent, Saucier and Parker "started sort of picking me up and kind of walking me out, kind of like very hurriedly." Pet. App. 4a, 25a; J.A. 23-24. See also J.A. 24-25 (respondent's testimony that the officers "held [him] up in the air" so that his feet "were barely touching the ground" as they "mostly carried me walking out").

Respondent claims that the officers took him to a military police van located behind the seating area, and that he was "shoved" inside. Pet. App. 4a, 25a. Respondent also claims that, as a result of the shove, he fell inside the van and was almost injured. *Ibid.* But respondent was not injured. To the contrary, respondent caught himself and avoided injury. *Ibid.* See also J.A. 30. After being driven to a military police station, respondent was briefly detained. He was then released, and he returned to his car and drove himself home. Pet. App. 4a-5a.

The news media covered the events at the Presidio. As a result, portions of the above-described events were recorded and then broadcast on the local news. Videotapes of relevant portions of the broadcasts, which are part of the record in this case, were lodged with the Court together with the petition for a writ of certiorari.

2. Respondent brought this action against Specialist Saucier and other officials pursuant to *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), alleging (among other things[5]) that they violated his

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[5] Respondent also alleged a violation of his First Amendment rights, and claimed that the arrest violated his Fourth Amendment rights because the officers lacked probable cause to detain him. As we pointed out in the petition (at 4-5 & n.4), the district court rejected both of those claims, and neither of them is before this Court; only the claim that

Fourth Amendment rights by using constitutionally excessive force to arrest him. Pet. App. 23a-27a. Following discovery, Specialist Saucier sought summary judgment on qualified immunity grounds, arguing that a competent officer could reasonably have believed that the amount of force he used was consistent with the Fourth Amendment.

The district court denied the motion.[6] The court first addressed whether summary judgment was appropriate on the merits of the Fourth Amendment claim. The constitutionality of an officer's use of force, the district court explained, depends on whether the force was "'objectively reasonable' in light of the facts and circumstances confronting [him], without regard to [his] underlying intent or motivation." Pet. App. 24a (quoting *Graham* v. *Connor*, 490 U.S. 386, 388 (1989)). The objective reasonableness of force, the district court continued, depends on "the severity of the

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Saucier used unreasonable force is. With respect to the First Amendment claim, the district court concluded that, given "the transitional state of the Presidio on September 24, 1994"—the Presidio was still an Army post—it was not clear that the Presidio could be considered a public forum. Pet. App. 44a; *id.* at 5a. As a result, the court concluded that "the rights of protestors at the Presidio were not well established on the date in question, [and] a reasonable military officer could have concluded that preventing protests at the base was Constitutional." *Ibid.* For the same reason, the district court concluded that summary judgment was appropriate with respect to the claim of unlawful arrest. The court explained that, because a reasonable officer could have believed that prohibiting protests on the base was constitutional, a reasonable officer also could have believed that respondent was about to commit a crime when he approached the speaking area and attempted to unfurl a protest banner. *Id.* at 5a, 23a. Finally, the district court concluded that respondent lacked standing to seek declaratory and injunctive relief. *Id.* at 53a-64a. Respondent sought to appeal those rulings, but the court of appeals dismissed the appeal for lack of jurisdiction. *Katz* v. *United States*, No. 98-16121 (9th Cir. Sept. 21, 1998). Respondent has not sought this Court's review of that dismissal.

[6] Although respondent had also asserted excessive force claims against two supervisory officials, General Glynn C. Mallory and Major Corbin Lee, the district court granted their motions for summary judgment. Respondent, the district court concluded, had produced no evidence linking those defendants to the disputed use of force. Pet. App. 30a-34a.

crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Ibid.*

After reviewing the descriptions of the events offered by Specialist Saucier, Sergeant Parker, and respondent, Pet. App. 24a-27a, and the "videotape of television news coverage of the events at the Presidio conversion ceremony," *id.* at 27a, the district court concluded that there was some dispute as to the nature of the risk respondent presented to others and to the Vice President. *Ibid.* Although the officers had argued that it was permissible to seize respondent and quickly remove him from the crowd because of their "concern[] for the safety of the public and for the speakers," the court noted that, according to respondent, he had removed the banner from his jacket before approaching the barrier—making it less likely that he was pulling a weapon from his jacket as he approached—and that Saucier had been told in advance that respondent might be a protester. *Id.* at 26a. The court also relied on the fact that respondent is 60 years old; that he was wearing a leg brace because of a fractured foot; and that respondent "did not overpower the officers at any time." *Id.* at 27a. Describing the videotape evidence, the court stated:

> Viewed in a light most favorable to [respondent], the videotape shows two officers, on each side of [respondent], removing him from the crowd and carrying or pulling him toward the van. Once they arrive at the van, the officers push [respondent] into the van. Given the nature of the crime at issue and the circumstances surrounding the incident, the Court cannot conclude that the use of force was reasonable as a matter of law.

Ibid.

The district court also denied Specialist Saucier's motion for summary judgment on the issue of qualified immunity,

reasoning that the denial of summary judgment on the merits necessarily foreclosed the possibility of immunity. Pet. App. 27a-30a. Following a "two-prong" inquiry mandated by Ninth Circuit precedent, the district court first held that the law regarding the use of force was clearly established at the time the challenged conduct occurred. *Id.* at 28a-29a & n.1. Turning to the "next step" of the inquiry, the court examined whether "a reasonable officer could have believed that" Saucier "acted lawfully with regard to the degree of force used to remove [respondent] from the crowd and place him inside the van." *Id.* at 29a. In "the Fourth Amendment context," the district court held, "the qualified immunity inquiry is the same as the inquiry made on the merits. * * * The Court must consider whether the totality of the circumstances justified the particular type of seizure." *Id.* at 30a. In this case, the district court explained, it had already found disputed facts that precluded summary judgment on whether Saucier's use of force was reasonable. *Ibid.* It necessarily follows, the court declared, that Saucier is "not entitled to summary judgment on the basis of qualified immunity." *Ibid.*

3. The court of appeals affirmed. Pet. App. 1a-16a. The court first rejected the government's contention that it was error to "equate[] the reasonableness test for the defense of qualified immunity with the reasonableness test for the merits of an excessive force claim." *Id.* at 8a. Like the district court, the court of appeals explained that, in the Ninth Circuit, the qualified immunity inquiry has two prongs. The first asks whether the legal standard or formula governing the officer's conduct is clearly established. The second asks whether a reasonable officer, applying that standard, could have believed his conduct was lawful. *Ibid.* In excessive force cases, the court stated, the Fourth Amendment reasonableness test and the second prong of the qualified immunity analysis both focus "on the objective reasonableness of the officer's conduct." *Id.* at 10a. "Because of this parity,"

the court concluded, "we have repeatedly held that the inquiry as to whether officers are entitled to qualified immunity for the use of excessive force is the same as the inquiry on the merits of the excessive force claim." *Ibid.* (internal quotation marks omitted). The court of appeals rejected the government's contention that equating the qualified immunity inquiry and the Fourth Amendment reasonableness test is inconsistent with the Ninth Circuit's earlier en banc decision in *Hammer* v. *Gross*, 932 F.2d 842, 850, cert. denied, 502 U.S. 980 (1991), and this Court's decision in *Anderson* v. *Creighton*, 483 U.S. 635, 639 (1987). Pet. App. 12a-14a. In *Anderson*, this Court rejected the argument that an officer who conducts an unreasonable *search* in violation of the Fourth Amendment cannot, by definition, have behaved reasonably so as to be entitled to qualified immunity. 483 U.S. at 643. In *Hammer*, the Ninth Circuit relied on *Anderson* to reject the argument that "an officer who has used unreasonable *force* cannot, by definition, have acted reasonably" so as to be entitled to qualified immunity. *Hammer*, 932 F.2d at 850 (emphasis added). Noting that *Anderson* v. *Creighton* itself had rejected a "similar contention" in the context of searches, the *Hammer* court explained:

> Whether a search is "unreasonable" within the meaning of the Fourth Amendment is an entirely different question from whether an officer reasonably could have believed his actions lawful under the Fourth Amendment. *Anderson*, 483 U.S. at 643-44 * * *. To accept Hammer's contention would be to eliminate all possibility of immunity for violations of the Fourth Amendment, an unacceptable outcome.

Ibid.

The court of appeals in this case attempted to distinguish the en banc decision in *Hammer* as having been resolved under the first prong of the Ninth Circuit's two-prong

approach. Pet. App. 13a. In *Hammer*, the court of appeals stated, the governing legal standard had changed over time and thus was not "clearly established." According to the court of appeals, this Court had "articulated a new objective reasonableness test that was different" from the "'shock-the-conscience' test" in effect at the time the defendant in *Hammer* had acted. *Ibid.* (citing *Graham*, 490 U.S. at 386). Because a reasonable officer "could have believed that [the defendant's] conduct did not 'shock the conscience' and thus was in fact lawful under the legal test used at the time," the court stated, the defendant in *Hammer* could be entitled to qualified immunity even though the "amount of force used * * * violated the Fourth Amendment because it was objectively unreasonable." *Ibid.* "A defendant," the court of appeals concluded, "will always be entitled to qualified immunity when the law governing his or her conduct was not clearly established—the first prong of the qualified immunity defense." *Id.* at 14a.

In a footnote, the court of appeals attempted to distinguish this Court's decision in *Anderson* v. *Creighton*. Pet. App. 14a n.4. *Anderson*, the court of appeals stated, primarily "focuses on the proper formulation of the 'clearly established'" or "first prong" of the qualified immunity inquiry. *Ibid.* *Anderson* does not, the court of appeals continued, "address the application of the second prong of the qualified immunity analysis" (*i.e.*, whether a reasonable officer could have believed the relevant conduct to be lawful), "let alone its application in excessive force cases." *Ibid.*

Having concluded that the qualified immunity inquiry does not differ from the test of reasonableness under the Fourth Amendment itself, the Ninth Circuit then turned to whether "the amount of force [Specialist Saucier] used in arresting [respondent] was so minimal that it was *per se* reasonable." Pet. App. 14a-15a. "The question of the reasonableness of force," the court of appeals stated, "is usually a question of fact for the jury," and summary judgment

therefore is appropriate only "when, viewing the evidence in the light most favorable to [the plaintiff], the evidence compels the conclusion that [the officer's] use of force was reasonable." *Id.* at 15a n.5 (internal quotation marks omitted). In this case, the court of appeals concluded, the force used was not so minimal as to compel a finding of reasonableness.

The court noted that, according to respondent, Saucier and Parker had seized him from behind "without warning or speaking to him," half-carried, half-walked him for about fifty feet, and forcefully pushed him inside the van. Pet. App. 15a. On the whole, the court appeared to conclude, that constituted a disproportionate response. "Unfurling a banner," the court of appeals stated, is not a severe crime; respondent was a sixty-year-old man wearing a leg brace; "[t]here is no indication that he was armed or dangerous"; and, "[f]rom all that appears at this stage of the case," respondent "did not pose an immediate threat to the safety of the officers or anyone else." *Ibid.* The court therefore concluded that summary judgment was properly denied on the merits of the Fourth Amendment claim, and thus on the issue of qualified immunity as well. *Ibid.*

The court of appeals denied rehearing en banc. Pet. App. 65a-66a. On November 13, 2000, this Court granted the petition for a writ of certiorari. 121 S. Ct. 480.

SUMMARY OF ARGUMENT

I. A. Qualified immunity precludes a government official from being held liable for unconstitutional conduct unless the official violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). In *Anderson* v. *Creighton*, 483 U.S. 635 (1987), this Court clarified the level of generality at which the qualified immunity inquiry must take place. Immunity, the Court held, may not be denied merely because "the relevant 'legal rule'" was "clearly established" at a higher level of generality. *Id.* at

639. Instead, the Court held, immunity may be denied only if "the right the official is alleged to have violated [was] 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what *he is doing* violates that right." *Id.* at 640 (emphasis added). The Court also rejected the contention that the defense of qualified immunity is necessarily foreclosed in Fourth Amendment cases whenever an unreasonable search has occurred. *Id.* at 643.

Anderson v. *Creighton* controls this case. Like the determination of whether a search is reasonable, the determination of whether a particular use of force is reasonable "is not capable of precise definition or mechanical application," and depends on "a careful balancing of the nature and quality of the intrusion * * * against the countervailing governmental interests at stake." *Graham* v. *Connor*, 490 U.S. 386, 396 (1989) (internal quotation marks omitted). The test of "objective reasonableness" this Court articulated in *Graham* is by necessity general and does not, for every set of circumstances an officer might encounter, clearly resolve whether a particular use of force will be held to be reasonable. Consequently, even if an officer uses objectively unreasonable force and violates the Fourth Amendment, he cannot be held liable in damages for that conduct unless the illegality of his conduct was sufficiently "obvious" in advance "that no reasonably competent officer would have concluded" that the actions were constitutional. *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986). Thus, a Fourth Amendment violation occurs when, even taking due account of the split-second nature of an officer's decision, the conduct turns out to have been, on balance, objectively unreasonable. But immunity is nonetheless appropriate unless that conduct was sufficiently beyond the sometimes "hazy border between excessive and acceptable force that [the official] had to know he was violating the Constitution," *i.e.*, unless governing case law or the "applica-

tion of the [excessive force] standard would inevitably lead every reasonable officer in [the Defendants'] position to conclude the force was unlawful." *Priester* v. *City of Riviera Beach*, 208 F.3d 919, 926-927 (11th Cir. 2000); *Post* v. *City of Fort Lauderdale*, 7 F.3d 1552, 1559 (1993), amended, 14 F.3d 583 (11th Cir. 1994).

Notwithstanding *Anderson*, the Ninth Circuit in this case held that, in the context of unreasonable force claims, the question of Fourth Amendment reasonableness is the same as the qualified immunity inquiry, and that an officer therefore cannot be entitled to qualified immunity if he used constitutionally unreasonable force. The court of appeals reasoned that force cannot be "objectively reasonable" for purposes of the qualified immunity inquiry, while also being "objectively unreasonable" for purposes of the Fourth Amendment itself. See, *e.g.*, Pet. App. 10a. This Court, however, rejected precisely that reasoning as "unpersuasive" in *Anderson*. The fact that a particular search or seizure turns out to have been unreasonable, the Court explained, does not necessarily resolve whether its illegality was sufficiently obvious in light of pre-existing law that no reasonable officer could have thought it to be reasonable. As a result, the Court held, qualified immunity is no less available to officers who reasonably err in determining the boundaries of lawful conduct under the Fourth Amendment than to those who make similar errors in other areas of law. 483 U.S. at 643.

The Ninth Circuit's rationale also obscures a critical difference between the functions served by the reasonableness inquiry in the Fourth Amendment and in the qualified immunity test. Although both use the term "reasonable" (or its converse, "unreasonable"), they employ that term for different purposes and in different senses. When a decisionmaker determines whether constitutionally unreasonable force has been used in violation of the Fourth Amendment, it articulates a standard to govern the conduct of an officer confronting a certain set of facts, *i.e.*, it decides whether the

officer's *conduct* was "objectively reasonable" for purposes of the Fourth Amendment. *Graham*, 490 U.S. at 397. But when a decisionmaker resolves the question of immunity, it asks a different question—whether that standard of conduct was sufficiently *obvious* in the first instance that it would be unreasonable to have reached the opposite conclusion. Thus, under the Fourth Amendment, reasonableness defines the boundaries of lawful conduct; in the qualified immunity context, it defines the often wider boundaries of what an officer might *reasonably have believed* to be lawful at the time he acted.

B. Seeking to reconcile its decision with *Anderson*, the Ninth Circuit suggested (in a footnote) that *Anderson* turned on the fact that the general legal rule to be applied when judging the official conduct there, unlike the test applicable here, was uncertain. That contention, however, cannot be reconciled with *Anderson*. The decision and question presented in *Anderson* were premised on the fact that the general legal rule governing the warrantless search at issue there was well settled; the question was whether officers could nonetheless be entitled to qualified immunity because it was not clearly established that, under that well-settled rule, the officers' conduct was illegal on the facts they confronted. Answering that question in the affirmative, this Court held it was error to deny qualified immunity merely because the general legal rule or standard was well settled. Instead, the Court held, qualified immunity may be denied only if no competent officer, in light of pre-existing law and the specific facts the defendant confronted, could reasonably have concluded that the search in question was lawful. 483 U.S. at 639-641. Similar analysis applies here.

C. The Ninth Circuit's decision also prevents qualified immunity from serving as an immunity to suit, because it effectively requires all excessive force cases to be resolved at trial. According to the court of appeals, the reasonableness of any use of force is usually "a question of fact" for

the jury, and qualified immunity must be denied at summary judgment unless "the evidence *compels* the conclusion that [the officer's] use of force was reasonable." Pet. App. 15a n.5 (emphasis added). That, however, turns the inquiry on its head. Qualified immunity is not appropriate merely where, viewing the facts in the light most favorable to the plaintiff, the force employed was reasonable as a matter of law. Instead, it is also appropriate where, under the plaintiff's version of the events, reasonable officers could disagree on whether or not the force was reasonable.

II. The decision below illustrates the danger of equating the qualified immunity and the reasonable force inquiries.

A. In this case, Specialist Saucier used minimal force to remove respondent from the crowd. The court of appeals held that such conduct was unreasonable because, among other things, Saucier should have spoken to respondent before removing him. But Saucier's decision to act decisively —and use surprise to his advantage—to gain control over an individual who was flagrantly violating the law was not unreasonable given the circumstances and the uncertainty Saucier confronted. In any event, Saucier's conduct was not sufficiently beyond the bounds of potentially lawful behavior under the Fourth Amendment that, in light of pre-existing law, every reasonable officer would necessarily have understood it to be unlawful.

B. The court of appeals also concluded that Specialist Saucier was not entitled to qualified immunity with respect to the amount of force used to move respondent into the van. But "[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers * * * violates the Fourth Amendment." *Graham*, 490 U.S. at 396 (internal quotation marks omitted). Besides, it is undisputed that the allegedly forceful push of which respondent complains did not come from Saucier—it came from Sergeant Parker—and the court of appeals has articulated no theory under which Saucier may be held legally responsible for it.

Because reasonable officers certainly could have believed that the amount of force *Saucier* used to place respondent into the van was lawful, Saucier is entitled to qualified immunity.

ARGUMENT

I. AN OFFICER WHO USES FORCE THAT IS ULTIMATELY FOUND UNREASONABLE UNDER THE FOURTH AMENDMENT MAY NEVERTHELESS BE ENTITLED TO QUALIFIED IMMUNITY

A. The Qualified Immunity Inquiry Is Distinct From The Substantive Fourth Amendment Excessive Force Inquiry Because Of The Different Purposes Served By The Two Inquiries

In *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982), this Court held that qualified immunity precludes a government official from being held liable for unconstitutional conduct unless the official violates "clearly established statutory or constitutional rights of which a reasonable person would have known." The qualified immunity inquiry is objective, and immunity may not be denied merely because, in the end, the officer's conduct was unlawful. Instead, even where an officer errs and violates the Constitution, immunity shields the officer from liability and suit unless, "on an objective basis, it is obvious that no reasonably competent officer would have concluded" that the actions at issue were constitutional at the time they were undertaken. *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986). "[I]f officers of reasonable competence could disagree on" the lawfulness of the conduct, "immunity should be recognized." *Ibid.*

Official immunity is rooted in the policy consideration that the "public interest requires decisions and action to enforce laws for the protection of the public." *Scheuer* v. *Rhodes*, 416 U.S. 232, 241 (1974). "Implicit in the idea that officials have some immunity—absolute or qualified—for their acts,

is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all." *Id.* at 242. Qualified immunity thus serves to ensure that officials do not "exercise their discretion with undue timidity." *Wood* v. *Strickland*, 420 U.S. 308, 321 (1975). Consistent with that goal, it provides "'ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" *Hunter* v. *Bryant*, 502 U.S. 224, 229 (1991) (quoting *Malley*, 475 U.S. at 343, 341).

1. After this Court decided *Harlow* in 1982, federal courts routinely recognized the appropriateness of immunity in cases in which an official was alleged to have violated a bright-line rule, where that rule was not recognized by the courts until after the official's conduct took place. For example, in *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985), this Court held that federal officers were entitled to qualified immunity for conducting warrantless wiretaps because, at the time the officers acted, it was not clearly established that the warrant clause extended to such interceptions. Until this Court decided *Anderson* v. *Creighton*, 483 U.S. 635 (1987), however, federal courts had greater difficulty deciding whether qualified immunity was available in cases where the general legal standard or rule was well defined at the time the officials acted, but the standard—because it did not establish a bright line—would not necessarily have put reasonable officials on notice that their conduct violated the plaintiff's rights. For example, the principle that "probable cause" is necessary to justify a Fourth Amendment search is well settled, but that principle by itself would not necessarily enable a reasonable law enforcement officer to ascertain whether a particular search is permissible under the circumstances confronting him. The question thus was whether an official could be entitled to qualified immunity where the governing legal standard or formula was well recognized, but

it was not clearly established that the official's conduct under the circumstances, judged according to the settled standard or formula, was unlawful.

In *Anderson* v. *Creighton*, 483 U.S. at 639, this Court resolved that question. In *Anderson*, the court of appeals held that qualified immunity was unavailable to an officer who allegedly conducted a warrantless search of a home, because the legal rule governing such searches—that they are unconstitutional "unless the searching officers have probable cause and there are exigent circumstances—was clearly established" at the time the officer acted. *Id.* at 640. The court of appeals "specifically refused" to address whether the result of *applying* that rule to the facts confronting the officer would have made it clear to every reasonable officer that the search was unlawful. *Id.* at 640-641.

This Court reversed. Addressing the issue of qualified immunity generally, the Court first held that immunity may not be denied merely because "the relevant 'legal rule'" was "clearly established" at a higher level of generality, *e.g.*, immunity cannot be denied in a due process case simply because "the right to due process of law is quite clearly established by the Due Process Clause." 483 U.S. at 639. Instead, the Court held, immunity may be denied only if "the right the official is alleged to have violated [was] 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that *what he is doing* violates that right." *Id.* at 640 (emphasis added). The Court continued: "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful * * * but it is to say that in the light of pre-existing law the unlawfulness" of the conduct "must be apparent." *Ibid.*

Turning to the case before it, the Court held that the court of appeals had erred by denying the officer's claim of qualified immunity merely because the relevant legal test—

as opposed to the result of applying that test to the facts confronting the officer—had been clearly established. *Anderson*, 483 U.S. at 640-641 (court of appeals' failure "to consider" the defendant's "argument that it was *not* clearly established that the circumstances with which [he] was confronted did not constitute probable cause and exigent circumstances" was "erroneous"). Instead, the Court explained, the court of appeals should have examined the "fact-specific" question of whether, "in light of * * * the information the searching officers possessed," a "reasonable officer could have believed [the] warrantless search to be lawful." *Id.* at 641. So long as reasonable officers could disagree on the lawfulness of the search under the particular facts and circumstances of that case, the Court explained, the defendants must be accorded qualified immunity. *Ibid.* See also *id.* at 638 ("Our cases * * * generally provid[e] government officials * * * with a qualified immunity * * * as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated.").

In *Anderson*, this Court also declined to establish an exception to the qualified immunity doctrine for Fourth Amendment claims. 483 U.S. at 643-646. The *Anderson* plaintiffs had argued that, because both the Fourth Amendment and the qualified immunity test articulated in *Harlow* turn on objective reasonableness, there is no reason to conduct a qualified immunity inquiry in Fourth Amendment cases. *Id.* at 643. This Court rejected that argument. The Court explained that it had previously applied qualified immunity in Fourth Amendment cases. *Ibid.* Moreover, the Court observed, the plaintiffs' argument was logically flawed, because it rested on the coincidence of the word "reasonable" in the qualified immunity test of *Harlow* and the substantive command of the Fourth Amendment. *Ibid.* Although the word appears in both contexts, it serves different purposes and has different meanings in each. In

the Fourth Amendment, it defines the boundary of lawful police conduct; but in qualified immunity, it defines the somewhat broader zone of conduct an officer might have, based on pre-existing law, reasonably believed to be lawful. Where a law enforcement officer makes a reasonable although mistaken judgment regarding the lawfulness of a search under the Fourth Amendment, the Court held, he should "no more be held personally liable in damages than should officials making analogous determinations in other areas of law." *Id.* at 643-644. See also 1 Wayne R. LaFave, *Search and Seizure* § 1.10(b), at 328 (3d ed. 1996) ("[T]he *Anderson* majority rejected" the contention "that a violation of the Fourth Amendment, being an 'unreasonable' search or seizure, could never be reasonable under *Harlow*.").

Anderson makes it clear that, as in other types of cases, the question of qualified immunity in Fourth Amendment cases is distinct from whether there has been a constitutional violation at all. To decide the constitutional question, the decisionmaker applies its best understanding of current law to determine whether, at bottom, the search or seizure was "unreasonable" within the meaning of the Fourth Amendment. See U.S. Const. Amend. IV; *Ohio* v. *Robinette*, 519 U.S. 33, 39 (1996) ("We have long held that the 'touchstone of the Fourth Amendment is reasonableness.'") (quoting *Florida* v. *Jimeno*, 500 U.S. 248, 250 (1991)). The Fourth Amendment reasonableness determination establishes the boundaries of lawful conduct; it represents an assessment of the official action that society is willing to tolerate as constitutionally acceptable. In contrast, the question for qualified immunity purposes is not Fourth Amendment reasonableness or the legality of the officer's conduct *vel non*. It is instead whether the officer should be spared the burden of litigation and potential monetary liability because—given uncertainty in either the legal standard or its application to the circumstances confronting the officer at the time he acted—an appropriately competent officer could *reasonably*

have believed that the search or seizure was reasonable within the meaning of the Fourth Amendment, even if such a belief would be erroneous. The qualified immunity determination thus does not represent a judgment regarding the conduct society is prepared to recognize as constitutionally permissible. Rather, it represents a judgment that, although the conduct is unconstitutional, the officer should not be held personally liable because the law did not make the illegality of his conduct "obvious" or "apparent" at the time he acted. See *Hunter*, 502 U.S. at 227 ("qualified immunity shields agents * * * if 'a reasonable officer could have believed [the seizure] to be lawful, in light of clearly established law and the information the arresting officers possessed.'"); *Anderson*, 483 U.S. at 641 (officers should be immune where they "reasonably but mistakenly conclude" that the search was lawful). As the Court explained in *Harlow*, an officer is entitled to immunity unless any reasonably competent official would "fairly be said to 'know' that the law forbade [the] conduct" in question. 457 U.S. at 818.

This Court repeatedly has recognized that distinction in Fourth Amendment search and seizure cases alike. Thus, in *Anderson* v. *Creighton*, the Court emphasized that, even if the search at issue there was unreasonable for Fourth Amendment purposes, the officer is entitled to immunity unless the unreasonableness of that search, under the circumstances the officer confronted, was sufficiently clear that "a reasonable official would understand that *what he is doing* violates" the Fourth Amendment, *i.e.*, the unreasonableness of the conduct "in the light of pre-existing law * * * must be *apparent*." *Anderson*, 483 U.S. at 640 (emphases added). And in *Malley* v. *Briggs* and *Hunter* v. *Bryant*, the Court explained that, even if the seizures (arrests) at issue in those cases were unreasonable, immunity may be denied only "if, on an objective basis, it is obvious that no reasonably competent officer would have concluded" that they were lawful, *Malley*, 475 U.S. at 341; qualified immunity, those decisions

further emphasized, must provide "'ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" *Hunter*, 502 U.S. at 229 (quoting *Malley*, 475 U.S. at 343, 341).

2. Notwithstanding this Court's decisions in *Anderson*, *Malley*, and *Hunter*, the Ninth Circuit in this case held that, for one particular type of Fourth Amendment claim—one challenging the reasonableness of a seizure based on the force used to effectuate it—a finding of unconstitutionality necessarily precludes a finding of qualified immunity, because "the inquiry as to whether officers are entitled to qualified immunity for the use of excessive force is the same as the inquiry on the merits of the excessive force claim." Pet. App. 10a (quoting *Alexander* v. *County of Los Angeles*, 64 F.3d 1315, 1322 (9th Cir. 1995)). The Ninth Circuit reached that conclusion based on the fact that both inquiries are framed in terms of "objective reasonableness." It is not possible, the Ninth Circuit reasoned, for the force to be "objectively reasonable" for purposes of the qualified immunity inquiry, while also being objectively unreasonable for purposes of the Fourth Amendment itself. See, *e.g.*, Pet. App. 10a (finding "parity" because both immunity "and the merits of an excessive force claim focus on the objective reasonableness of the officer's conduct"); *Street* v. *Parham*, 929 F.2d 537, 540, 541 n.2 (10th Cir. 1991) (once factfinder determines that "the force used was unnecessary under the circumstances, any question of objective reasonableness" for immunity purposes "has also been foreclosed" because "[n]o officer could reasonably believe that the use of unreasonable force did not violate clearly established law").

This Court, however, rejected precisely that reasoning in *Anderson*. In *Anderson*, the plaintiffs—like the court of appeals here—contended that the test for qualified immunity merely duplicates the Fourth Amendment merits inquiry because both require objective reasonableness; it "is not

possible," the *Anderson* plaintiffs argued, "to say that one 'reasonably' acted unreasonably." 483 U.S. at 643. This Court rejected the argument as "unpersuasive," *ibid.*, because it relies on a coincidence of language—the common use of the word "reasonable"—in the Fourth Amendment and the qualified immunity test articulated in *Harlow*. If the Fourth Amendment had been written to speak of "undue" searches and seizures, the Court explained, the fallacy of the argument would be apparent, even though the meaning of the Amendment would be unchanged:

> [The argument's] surface appeal is attributable to the circumstance that the Fourth Amendment's guarantees have been expressed in terms of "unreasonable" searches and seizures. Had an equally serviceable term, such as "undue" searches and seizures been employed, what might be termed the "reasonably unreasonable" argument against application of *Harlow* to the Fourth Amendment would not be available—just as it *would* be available against application of *Harlow* to the Fifth Amendment if the term "reasonable process of law" had been employed there. The fact is that, regardless of the terminology used, the precise content of most of the Constitution's civil-liberties guarantees rests upon an assessment of what accommodation between governmental need and individual freedom is reasonable * * *. Law enforcement officers whose judgments in making these difficult determinations are objectively legally reasonable [although ultimately mistaken] should no more be held personally liable in damages than should officials making analogous determinations in other areas of law.

Id. at 643-644.

The same analysis forecloses the Ninth Circuit's reasoning here. See *Oliveira* v. *Mayer*, 23 F.3d 642, 648 (2d Cir. 1994) (*Anderson* "authoritatively instructed that the objective reasonableness component of the inquiry as to lawfulness is not the same as the objective reasonableness component of the

inquiry as to qualified immunity"), cert. denied, 513 U.S. 1076 (1995); *Karnes* v. *Skrutski*, 62 F.3d 485, 491-492 n.3 (3d Cir. 1995) (the attempt to equate the two inquiries "misconstrues the nature of qualified immunity, and in any case has been rejected by the Supreme Court").[7] In *Graham* v. *Connor*, 490 U.S. 386, 397 (1988), this Court held that the legality of any use of force under the Fourth Amendment depends on "whether the officers' actions are 'objectively unreasonable' in light of the circumstances confronting them." See also *Tennessee* v. *Garner*, 471 U.S. 1, 8-9 (1985) (question is "whether the totality of the circumstances justifie[s] a particular sort of * * * seizure"). Expanding on that analysis, the Court identified several relevant factors, such as the severity of the crime, potential threats to officer safety, and whether the suspect resists arrest or attempts to flee. 490 U.S. at 396. And it emphasized that reasonableness "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20

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[7] Indeed, the Ninth Circuit's decision essentially resurrects the reasoning lower federal courts employed to bar qualified immunity in Fourth Amendment probable cause cases before *Anderson*—and which *Anderson* squarely rejects. Before *Anderson*, some courts of appeals had taken the position that, where an officer conducts a search or arrest without probable cause, he could not defend by arguing that he reasonably engaged in unreasonable conduct. See *Deary* v. *Three Un-Named Police Officers*, 746 F.2d 185, 192-193 (3d Cir. 1984); *Clark* v. *Beville*, 730 F.2d 739, 740-741 (11th Cir. 1984). See also Jon O. Newman, *Suing the Lawbreakers*, 87 Yale L.J. 447, 460 (1978) ("[I]f the plaintiff's own case requires him to show an arrest that was not reasonably based on probable cause, what does the [immunity] defense mean? Surely the officer could not *reasonably* believe that there was probable cause for an unlawful arrest, for an unlawful arrest is by definition an arrest for which a prudent police officer could not reasonably believe that there was probable cause."). *Anderson* ended that line of cases, holding unequivocally that a law enforcement officer could act in an objectively reasonable fashion even though he or she had violated the Fourth Amendment's bar on unreasonable searches or seizures. See *Oliveira*, 23 F.3d at 648 (Newman, J.) (conceding that *Anderson* "authoritatively instruct[s]" that the reasoning is mistaken).

vision of hindsight." *Ibid.* The "calculus of reasonableness" the Court observed, "must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.* at 396-397.

Ultimately, however, the Court concluded that the reasonable force test, like reasonableness under the Fourth Amendment generally, "is not capable of precise definition or mechanical application," and depends on "a careful balancing of the nature and quality of the intrusion * * * against the countervailing governmental interests at stake." 490 U.S. at 396 (internal quotation marks omitted). Consequently, like the standard of probable cause, neither the standard of "objective reasonableness" nor the non-exclusive list of factors identified in *Graham* necessarily establishes with clarity whether any particular quantity or form of force, under the specific circumstances confronting an officer, will be considered unlawful. To the contrary, reasonable judges applying *Graham* often disagree over whether the force employed under particular circumstances is constitutionally reasonable,[8] and so too can reasonable officers. See *Wilson*

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[8] Compare *Colston* v. *Barnhart*, 130 F.3d 96 (5th Cir. 1997) (use of deadly force objectively reasonable), cert. denied, 525 U.S. 1054 (1998), with *id.* at 103 (DeMoss, J., dissenting) (stating that officer's "failure to give a warning, which he was obliged to give, if feasible, before the use of deadly force" indicates that force may have been unreasonable); *Sharrar* v. *Felsing*, 128 F.3d 810, 820-822 (3d Cir. 1997) (finding use of force reasonable), with *id.* at 832-833 (Pollak, J., dissenting) (arguing that holding a deadly weapon to head of unarmed suspects may have, given the circumstances, violated the Fourth Amendment); *Joos* v. *Ratliff*, 97 F.3d 1125, 1126 (8th Cir. 1996) (finding use of force reasonable), with *id.* at 1126-1127 (M. Arnold, J., dissenting) ("I cannot say that the force applied to Mr. Joos was reasonable."); *In re City of Philadelphia Litig.*, 49 F.3d 945, 965-970 (3d Cir. 1994) (Greenberg, J.) (finding decision to use incendiary device reasonable under the Fourth Amendment), with *id.* at 974 (Scirica, J., concurring and dissenting) ("I do not believe that we can say, as a matter of law, that no reasonable jury could conclude that the decision to use the

v. *Layne*, 526 U.S. 603, 618 (1999) ("If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy."). Consequently, "if officers of reasonable competence could disagree on" the lawfulness of the seizure, "immunity should be recognized." *Malley*, 457 U.S. at 341. Indeed, this Court's decision in *Graham* suggests that very result, observing that "the officer's *objective* 'good faith'—that is, whether he could reasonably have believed that the force used did not violate the Fourth Amendment—may be relevant to the availability of the qualified immunity defense to monetary liability under § 1983." 490 U.S. at 399 n.12 (citing *Anderson*).[9]

Here, as in *Anderson*, the contention that the qualified immunity test and the Fourth Amendment's requirements converge rests on the fact that the Fourth Amendment's guarantee has been expressed in terms of reasonableness. And here, as in *Anderson*, the "precise content of" the Fourth Amendment's "civil-liberties guarantees" in any situation "rests upon an assessment of what accommodation between governmental need and individual freedom is reasonable." See *Graham*, 490 U.S. at 396 (determination of whether the force "used to effect a particular seizure" is constitutional "requires a careful balancing of the nature and quality of the intrusion * * * against the countervailing government in-

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incendiary device was an excessive use of force."); *Forrester* v. *City of San Diego*, 25 F.3d 804, 807 (9th Cir. 1994) ("ample evidence supports the jury's conclusion that the officers acted reasonably"), cert. denied, 513 U.S. 1152 (1995), with *id.* at 810 (Kleinfeld, J., dissenting) ("As I apply the *Graham* factors one by one, I cannot see how the force used in this case could be reasonable.").

[9] The Court also stated that "[s]ince no claim of qualified immunity has been raised in this case, * * * we express no view on its *proper application* in excessive force cases." 490 U.S. at 399 n.12 (emphasis added). That sentence on its face reserves the question *how* qualified immunity applies in excessive force cases, and not, as the court of appeals mistakenly believed, Pet. App. 14a n.4, *whether* it applies.

terests at stake"). Consequently, here, as in *Anderson*, "[l]aw enforcement officers whose judgments in making these difficult determinations are objectively legally reasonable should no more be held personally liable in damages than should officials making analogous determinations in other areas of law."

As this Court observed in a different context, "an *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Williams* v. *Taylor*, 120 S. Ct. 1495, 1522 (2000).[10] Just as a court may apply federal law in a manner that is incorrect but not unreasonable, so too an officer may, in applying *Graham* to particular circumstances, reach a conclusion that is incorrect but not unreasonable. So long as it would be a legally reasonable (if erroneous) application of Fourth Amendment standards for an officer to conclude that his conduct conforms to the Fourth Amendment's requirements—*i.e.*, so long as the conduct is sufficiently close to an unclear constitutional boundary that officers of appropriate competence could disagree on its legality—the officer is entitled to qualified immunity. It is only where an officer's belief in the lawfulness of the conduct under *Graham* would be *unreasonable*, rather than being merely *mistaken*, that immunity may be denied.

3. The Ninth Circuit's rationale obscures a critical difference between the functions the "objective reasonableness"

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[10] *Williams* construed the federal habeas corpus statute, 28 U.S.C. 2254(d)(1), which may contain a less forgiving test of reasonableness than that applicable in the qualified immunity context; Section 2254(d)(1) looks to whether a decision constitutes a reasonable *judicial* application of established law, while qualified immunity examines whether an appropriately competent *officer* reasonably could have thought the conduct lawful. See 120 S. Ct. 1506 n.12 (opinion of Stevens, J.) (Congress did not intend to draw the concept of "clearly established law" in Section 2254(d)(1) from "the doctrinally distinct law of qualified immunity," although the principle may be a "conceptual twin"). It nonetheless remains true that, in the qualified immunity and habeas contexts alike, an erroneous application of a constitutional test is different from an unreasonable one.

inquiry serves in the Fourth Amendment and in qualified immunity. As explained above, when a jury or a court determines whether constitutionally unreasonable force has been used in violation of the Fourth Amendment, it articulates a standard to govern the conduct of an officer confronting a certain set of facts, *i.e.*, it decides whether the officer's *conduct* was "objectively reasonable" for purposes of the Fourth Amendment. *Graham*, 490 U.S. at 397. But when a decision-maker resolves the question of immunity, it asks a different question—whether that standard of conduct was sufficiently *obvious* in the first instance that it would be objectively unreasonable for an officer to have reached the opposite conclusion. Although both inquiries use the term "reasonable" (or its converse, "unreasonable"), they employ that term for different purposes and in different senses. With respect to the Fourth Amendment itself, reasonableness defines the boundaries of lawful conduct. In the immunity context, it defines the often wider boundaries of what an officer—because of a lack of clarity either in the legal standard or in its application to the specific facts of the case—might *reasonably have believed* to be lawful at the time he acted.

Consequently, the determination that an officer's use of force was "unreasonable" for Fourth Amendment purposes does not, as a matter of logic, necessarily preclude a determination that the question was sufficiently close that reasonable officers (or reasonable judges or jurors) could have disagreed about that conclusion in advance. As the Second Circuit has explained, "to say that the use of constitutionally excessive force violates a clearly established right * * * begs the open question whether the particular degree of force under the particular circumstances was" so clearly "excessive" that no reasonably competent officer could have thought it lawful. *Finnegan* v. *Fountain*, 915 F.2d 817, 823 (2d Cir. 1990). In other words, a Fourth Amendment violation occurs when, even taking due account of the split-second nature of an officer's decision, the conduct turns out to have

been, on balance, objectively unreasonable. But immunity is nonetheless appropriate unless that conduct was sufficiently "beyond" the sometimes "hazy border between excessive and acceptable force that [the official] had to know he was violating the Constitution," *i.e.*, unless pre-existing case law or the "application of the [excessive force] standard would inevitably lead every reasonable officer in [the Defendants'] position to conclude the force was unlawful." *Priester* v. *City of Riviera Beach*, 208 F.3d 919, 926-927 (11th Cir. 2000); *Post* v. *City of Fort Lauderdale*, 7 F.3d 1552, 1559 (1993), amended, 14 F.3d 583 (11th Cir. 1994).[11] Precisely that

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[11] Although findings of excessive force and qualified immunity are not necessarily inconsistent, they are not necessarily consistent either. In some cases, there will be no set of facts supported by the evidence under which the officer's conduct could both be unconstitutional and sufficiently close to an unclear constitutional boundary to warrant immunity. That may sometimes be true in cases involving the application of bright-line rules—such as the rule concerning the use of deadly force announced in *Tennessee* v. *Garner*, 471 U.S. 1, 11 (1985)—where the parties present two different, and mutually exclusive, versions of the facts. For example, if the plaintiff argues that the officer shot him while he was handcuffed and compliant, but the officer claims the plaintiff was loose and threatening him and others with a deadly weapon, one would not expect a jury accepting one of those two stories to reach different conclusions regarding Fourth Amendment reasonableness and qualified immunity. Under the plaintiff's version of the facts, the officer's conduct is unreasonable, and so obviously unreasonable that immunity could not be granted; under the officer's, in contrast, the conduct should be considered reasonable as a matter of law. Great caution in this area, however, is warranted. Juries are not restricted to accepting one party's or the other's view of the facts, and they often conclude that the truth lies somewhere in between. Moreover, even supposedly bright-line rules do not necessarily yield undebatably certain legal results when applied to specific facts. Thus, *Tennessee* v. *Garner* holds that officers may not use deadly force to apprehend a fleeing felon unless the officer "has probable cause to believe that the felon poses a threat of serious physical harm, either to the officer or to others." 471 U.S. at 11. Notwithstanding the bright-line nature of that rule, an officer could be entitled to immunity even though his conduct was unconstitutional. For example, an officer might be entitled to qualified immunity because it had not been clearly established, at the time he acted, that the particular form of force he employed should be considered "deadly" under

conclusion has been reached at various times by court of appeals after court of appeals, including the First, Second, Fourth, Fifth, Seventh, Eighth, and Eleventh Circuits.[12] As

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Garner; or because the officer reasonably (but mistakenly) concluded that the facts were sufficient to establish probable cause to believe that the suspect was armed and dangerous.

[12] *Napier* v. *Town of Windham*, 187 F.3d 177, 188 (1st Cir. 1999) (because officer "*could have reasonably believed*" that the force "was justified and lawful," he was, "under the standard enunciated in *Anderson*, * * * entitled to qualified immunity * * *, whether [there was] a viable Fourth Amendment violation or not"); *Finnegan*, 915 F.2d at 823 (immunity proper unless it "should have been apparent" that the "particular degree of force under the particular circumstances was excessive"); *Lennon* v. *Miller*, 66 F.3d 416, 425 (2d Cir. 1995) (immunity appropriate where facts would not support the conclusion "that the force used was so excessive that no reasonable officer would have made the same choice"); *Rowland* v. *Perry*, 41 F.3d 167, 173 (4th Cir. 1994) (immunity question is "whether a reasonable officer could have believed that the use of force alleged was objectively reasonable"); *Brown* v. *Glossip*, 878 F.2d 871, 873 (5th Cir. 1989) ("We can discern no principled distinction between the availability of qualified immunity as a defense to unreasonable searches * * * under the fourth amendment and as a defense to an excessive force claim also grounded in the fourth amendment."); *Ellis* v. *Wynalda*, 999 F.2d 243, 246 n.2 (7th Cir. 1993) ("the doctrine of qualified immunity still serves an important purpose in cases of alleged excessive force"); *Jones* v. *Webb*, 45 F.3d 178, 184 (7th Cir. 1995) (summary judgment proper where "a reasonable police officer certainly could have believed that the limited force applied * * * was not unconstitutionally excessive in light of clearly established law"); *Landrum* v. *Moats*, 576 F.2d 1320, 1327-1328 (8th Cir.) ("The defense of good faith is not * * * inapplicable to an action based on excessive force."), cert. denied, 439 U.S. 912 (1978); *McGruder* v. *Heagwood*, 197 F.3d 918, 920 (8th Cir. 1999) ("objectively reasonable police officers could have believed that they were not using excessive force, though this belief may have been erroneous"); *Gold* v. *City of Miami*, 121 F.3d 1442, 1446 (11th Cir. 1997) (officer entitled to immunity "unless application of the [excessive force] standard would inevitably lead a reasonable officer in the defendant's position to conclude that the force was unlawful") (internal quotation marks omitted), cert. denied, 525 U.S. 870 (1998). See also *Sledd* v. *Lindsay*, 102 F.3d 282, 287 (7th Cir. 1996) (plaintiff may defeat qualified immunity by "show[ing] that the force was *so excessive* that, as an objective matter, the police officers would have been *on notice that they were violating* the Fourth Amendment") (emphases added)). We note that, at other times, two of those courts have

Justice Powell observed while sitting by designation on the Fourth Circuit, "[t]here is no principled reason not to allow a defense of qualified immunity in an excessive use of force claim, when it is allowed in other actions alleging violations of the Fourth Amendment." *Slattery* v. *Rizzo*, 939 F.2d 213, 215 (1991).[13]

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equivocated. One Eighth Circuit case treats the issue as if it were unresolved. *Nelson* v. *County of Wright*, 162 F.3d 986, 990 n.5 (1998). And the Seventh Circuit, in *Frazell* v. *Flanigan*, 102 F.3d 877, 886-887 (1996), commented favorably on equating the qualified immunity and Fourth Amendment reasonableness inquiries. But see *Lanigan* v. *Village of East Hazel Crest*, 110 F.3d 467, 477 (7th Cir. 1997) ("We do not view *Frazell* as closing the door on" the possibility of permitting an officer to "claim the shield of qualified immunity" despite "his unreasonable use of force"). See also *McNair* v. *Coffey*, No. 00-1139, 2000 WL 1801253 (7th Cir. Dec. 8, 2000); pp. 36-38 & notes 17-18, *infra*.

[13] Ironically, the decision below—like others that attempt to equate the Fourth Amendment and qualified immunity inquiries—tends to dilute the substantive guarantees of the Fourth Amendment as much as it undermines qualified immunity. For example, the decision below at points suggests that the two inquiries are the same because, under the Fourth Amendment, conduct is "reasonable" if an officer reasonably could have believed it to be reasonable. See Pet. App. 10a (declaring that a seizure is reasonable under Fourth Amendment if "a reasonable officer *could have believed* that the force used was necessary under the circumstance[s]") (emphasis added). See also *Scott* v. *District of Columbia*, 101 F.3d 748, 759 (D.C. Cir. 1996) (equating the inquiries by holding that the Fourth Amendment is violated where "the excessiveness of the force is *so apparent* that *no reasonable officer* could have believed in the lawfulness of his actions") (emphases added; quotation marks omitted), cert. denied, 520 U.S. 1231 (1997). That attempt to equate the two inquiries, however, misstates and improperly dilutes the Fourth Amendment standard. An application of force violates the Fourth Amendment if the force is, on an objective basis, "unreasonable," as this Court's cases and constitutional text both attest. See U.S. Const. Amend. IV (guaranteeing the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures"); *Graham*, 490 U.S. at 396 (issue is whether "the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment"). The fact that a reasonable officer—based on pre-existing law—could have *believed* his conduct to be constitutionally reasonable does not automatically make that conduct reasonable for Fourth Amendment purposes. Indeed, equating the

B. The Ninth Circuit's Attempt To Reconcile Its Decision With This Court's Decisions Is Unpersuasive

Notwithstanding its reliance on the very reasoning this Court rejected as "unpersuasive" in *Anderson* v. *Creighton*, the court of appeals attempted to reconcile its decision with *Anderson* in a footnote. Pet. App. 14a n.4. Under Ninth Circuit precedent, the court of appeals pointed out, the qualified immunity inquiry must proceed in two steps. First, the court asks whether the "law"—by which the Ninth Circuit means the applicable legal rule, governing factors, verbal formula, or standard—"was clearly established" at the time the officer acted. *Id.* at 8a; *Headwaters Forest Def.* v. *County of Humboldt*, 211 F.3d 1121, 1141 (9th Cir. 2000) (declaring that, for purposes of the first prong, "the law concerning the use of excessive force is clearly established" even though its application in the particular factual context was "unprecedented," because "the law under *Graham* and its progeny concerning the relevant factors for assessing the limits on police use of force under the Fourth Amendment"

"unreasonable" force proscribed by the Fourth Amendment with force that no reasonable officer could consider reasonable renders the Fourth Amendment inquiry hopelessly circular. If taken seriously, such an approach would arrest the development of substantive Fourth Amendment law, labeling any seizure as "reasonable" whenever reasonable minds could disagree on the outcome under *Graham*. Nor does it matter that, under *Graham*, reasonableness determinations allow for reasonable factual mistakes, and must be made from the perspective of the officers on the scene, with due regard for the split-second nature of their decisions. Because of those requirements, there may be a range of "reasonable" options available to an officer in any given situation, and officers are not required to select the most reasonable or least forceful option. But it does not follow that a particular use of force is automatically "reasonable" within the meaning of the Fourth Amendment merely because an officer, based on the law existing at the time he acted, could reasonably have believed that to be the case. Instead, where an officer's choice is beyond the range of reasonable alternatives, his conduct violates the Fourth Amendment, even if he is entitled to immunity because his mistake was, in light of pre-existing law, justifiable.

are well established). See also Pet. App. 29a (district court's similar reasoning in this case). Second, the court conducts what it terms the "reasonable officer" inquiry, asking whether a reasonable officer could have believed the conduct to be lawful under the clearly articulated standard identified in the first prong. *Id.* at 8a.

Attempting to distinguish *Anderson* based on that two-pronged approach, the court of appeals declared that most of this "Court's qualified immunity discussion in *Anderson* focuses on the proper formulation of the 'clearly established'" step, or "the first prong" of that two-step analysis. Pet. App. 14a n.14. *Anderson*, the Court continued, does not "address the application of the second prong of the qualified immunity analysis," which is whether a reasonable officer could have believed his conduct to be lawful under the established standard. *Ibid.* In essence, the court of appeals seemed to reason, qualified immunity can be appropriate in excessive force cases, consistent with *Anderson*, only when there is uncertainty about the verbal formula or legal standard to be applied (the Ninth Circuit's prong one), but not where there is uncertainty about the outcome of applying a settled formula to the facts confronting the officer (the Ninth Circuit's prong two). See *id.* at 13a-14a (distinguishing earlier Ninth Circuit en banc decision according an officer immunity notwithstanding his use of unreasonable force as resting on a change in the governing Fourth Amendment standard). See also pp. 8-9, *supra*. Far from reconciling the decision below with *Anderson*, however, that purported distinction underscores the inconsistency.

1. As an initial matter, *Anderson* does not itself contemplate dividing the qualified immunity inquiry into two distinct "prongs," one involving whether there was "clearly established" law, and the other involving whether a reasonable officer could have believed his conduct to be lawful. Instead, *Anderson* makes it clear that the Ninth Circuit's second prong (whether a reasonable officer could have

thought the conduct lawful) provides the answer to the first (whether the law is "clearly established"). In *Anderson* itself, this Court explained that the law is "clearly established" in the sense relevant to the qualified immunity inquiry only if "[t]he contours of the right" are "sufficiently clear that a reasonable official would understand that *what he is doing* violates that right." 483 U.S. at 640 (emphasis added). And in *Wilson* v. *Layne*, 526 U.S. at 614-615, this Court repeated that observation, declaring that "'[c]learly established' for purposes of qualified immunity means that '[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" Whether or not the general legal standard is clear, if reasonable officers could have disagreed on the conduct's lawfulness at the time the defendant acted, the law was not "clearly established" and immunity must be recognized. *Malley*, 475 U.S. at 341. Accordingly, *Anderson* cannot be distinguished as relating to "prong one" instead of "prong two" of the Ninth Circuit's two-prong immunity test because, under *Anderson*, the second "prong" of the Ninth Circuit's formulation (the reasonable officer test) is the means of answering the clearly established law inquiry. Whether or not the relevant legal formula or standard is well recognized, the law is *not* "clearly established" if officers could reasonably have believed that what *they were doing* would not violate the plaintiff's rights. See *Lennon*, 66 F.3d at 422 ("the defendants may nevertheless enjoy qualified immunity if it was objectively reasonable for them to believe that their actions did not violate those rights"); *Lanigan*, 110 F.3d at 472 (under the "analysis dictated by *Anderson* v. *Creighton*," court must "evaulat[e] the specific facts confronting an officer at the time of the challenged conduct").[14]

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[14] Contrary to the Ninth Circuit's supposition, it is not true that qualified immunity can be resolved solely by reference to the "first prong" of its test, *i.e.*, that a defendant "will always be entitled to qualified

2. In any event, the court of appeals was flatly incorrect to assert (Pet. App. 14a n.4) that *Anderson* v. *Creighton* addresses the Ninth Circuit's first prong (*i.e.*, whether the governing legal formula or standard was well settled), rather than the second prong (whether an officer could have thought his conduct lawful). In *Anderson*, there was no issue regarding the relevant legal formula (the Ninth Circuit's first prong) because the legal standard governing the conduct there—the warrantless search of a home—was well settled: Such warrantless searches, this Court explained, had long been held to be unlawful unless the officer has probable cause and exigent circumstances. See *Anderson*, 483 U.S. at 640.[15] Surely *Anderson* cannot be distinguished as a case involving uncertainty regarding the governing legal standard where *Anderson* itself characterizes the standard as longstanding and undisputed.

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immunity when" the legal test "governing his or her conduct * * * was not clearly established." Pet. App. 14a. In some cases, it may be sufficiently clear that certain conduct is unconstitutional even though the governing legal principle has not been reduced to a single articulation. Conversely, *Anderson* v. *Creighton* teaches that certainty regarding the legal test is not itself a sufficient basis for denying immunity. Instead, an officer is entitled to qualified immunity if a reasonably competent official, applying the governing legal test to the facts before him, could reasonably have believed that his conduct was lawful. See *Anderson*, 483 U.S. at 638 ("Our cases * * * generally provid[e] government officials performing discretionary functions with a qualified immunity as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated.").

[15] See also *Steagald* v. *United States*, 451 U.S. 204, 211 (1981) (except for cases of "consent or exigent circumstances," the Court has "consistently held that entry into a home to conduct a search or make an arrest is unreasonable under the Fourth Amendment unless done pursuant to a warrant"); *Payton* v. *New York*, 445 U.S. 573, 578 (1980); *Wong Sun* v. *United States*, 371 U.S. 471, 479 (1963) (Probable cause is "evidence which would 'warrant a man of reasonable caution in the belief' that a felony has been committed.") (quoting *Carroll* v. *United States*, 267 U.S. 132, 162 (1925)).

To the contrary, *Anderson*'s core holding is predicated on the fact that the "legal rule" governing the officer's conduct in that case was well settled. The question *Anderson* decided was whether, given the clarity of the relevant legal standard, qualified immunity could still protect officers who might have reasonably erred in *applying* that established standard to the circumstances confronting them, *i.e.*, in determining that probable cause and exigent circumstances were present. 483 U.S. at 638-641.[16] The court of appeals in that case had refused to permit immunity in those circumstances, holding that the clarity of the general legal standard precluded qualified immunity. This Court reversed, holding that immunity protects officers even if the legal standard is clear, where it is not clear that every reasonable officer applying that legal standard to the facts of the case would understand the conduct to be unlawful. See *id.* at 640-641 (court of appeals erred by refusing to consider "the argument that it was not clearly established that the circumstances with which Anderson was confronted did not constitute probable cause and exigent circumstances"); 1 LaFave, *supra*, § 1.10(b), at 328 ("the question to be considered on remand * * * '[wa]s the objective (albeit fact-specific) question whether a reasonable officer could have believed Anderson's warrantless search to be lawful'"). See also *Hunter*, 502 U.S. at 228 (officers entitled to immunity "if

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[16] Indeed, the question presented in *Anderson* was whether "the qualified immunity provided by *Harlow* [may be] overcome by a mere showing that the general legal rule was well established, or must the court further determine that the official could not have reasonably believed that his own conduct was lawful in light of the facts and circumstances as they reasonably appeared to him." Gov't Br. at i, *Anderson* v. *Creighton* (No. 85-1520). That, moreover, was the question the parties briefed, see, *e.g.*, *id.* at 13-30; Resp. Br. at 19-30, *Anderson* v. *Creighton* (No. 85-1520). And it was the question presented as the dissenting opinion understood it as well, *Anderson*, 483 U.S. at 657 (Stevens, J., dissenting) (arguing that, before discovery takes place, "the *Harlow* requirement concerning the clearly established law applies to *the rule on which the plaintiff relies*").

a reasonable officer could have believed" probable cause existed). As this Court explained, the relevant question for qualified immunity is "whether a reasonable officer could have believed Anderson's warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed." 483 U.S. at 641. That *is* what the Ninth Circuit considers to be the second prong—the reasonable officer test—expressed in nearly identical language. See Pet. App. 8a (under second prong, court asks whether "a reasonable official could have believed the conduct was lawful").

3. Stripped of the prong-one and prong-two labels, the Ninth Circuit's rationale rests on the assumption that, because the legal standard or test applicable in excessive force cases was settled by this Court's decision in *Graham*, officers cannot be entitled to qualified immunity if they violate constitutional norms. See Pet. App. 13a-14a. Stating that position more directly, another court of appeals has opined that "[u]ncertainty about the legal standard" applicable to excessive force cases "ended * * * with [this Court's] opinion in *Graham*"; while "[t]here may still be uncertainty in the application of that standard to particular situations," that court continued, "this is not the kind of legal uncertainty that *Anderson* and *Wilson* discuss." *McNair* v. *Coffey*, No. 00-1139, 2000 WL 1801253, at *2 (7th Cir. Dec. 8, 2000).

As the foregoing discussion (pp. 16-21, 34-35 & note 16, *supra*) explains, that characterization of *Anderson* is exactly backwards: "[U]ncertainty in the application of" well-settled legal standards "to particular situations" is *precisely* "the kind of legal uncertainty that" *Anderson* addressed. In *Anderson* itself, this Court specifically held that, even though the legal standards governing the search—the requirement of probable cause and exigent circumstances—were well established, the officer was entitled to qualified immunity unless it should have been obvious to him that probable

cause and exigent circumstances were absent on the facts before him. 483 U.S. at 640-641.[17] By the same token, even though the standard of "objective reasonableness" and the non-exclusive list of relevant factors from *Graham* are well established here, Specialist Saucier is entitled to qualified immunity unless it should have been obvious to him that, under the facts before him and in light of pre-existing law, the force he employed was objectively unreasonable within

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[17] Any attempt to limit qualified immunity to cases in which the abstract legal rule or test—as opposed to the result of applying it—is unsettled, moreover, would effectively convert the qualified immunity defense into a pleading rule, a result that *Anderson* specifically sought to avoid. As this Court observed, such an approach would permit plaintiffs to defeat immunity by characterizing their rights very generally, *e.g.*, by arguing that the right to due process is clearly established, and by arguing that the defendant is merely disputing an application of the general rule to the specific facts of the case. 483 U.S. at 639-640. Because rules of law "[i]n constitutional adjudication, as in the common law, * * * often develop incrementally as earlier decisions are applied to new factual situations," *Williams* v. *Taylor*, 120 S. Ct. at 1508 (opinion of Stevens, J.), the line between a new rule or principle and a mere application of an existing principle is a slippery one, and potentially subject to manipulation. See *Anderson*, 483 U.S. at 640 n.2. In fact, the court of appeals' decision in *McNair*, *supra*, appears to engage in precisely such a shell game. In that case, the defendant argued that his conduct—he displayed force by pointing a gun at the plaintiffs—did not violate the plaintiffs' clearly established Fourth Amendment rights. The court of appeals suggested that it would have considered that argument for immunity purposes if the defendant had characterized the issue as purely legal, arguing that it was not clearly established that a *display* of force causing fright, as opposed to the *application* of force through physical contact, can constitute an excessive use of force under the Fourth Amendment. *McNair*, 2000 WL 1801253, at *1, *3. But it declined to entertain the argument because the defendant had characterized his contention differently, taking the abstract legal rules "as settled," and arguing only that, under those rules, it was not clearly established that *his conduct* would violate the plaintiff's rights. *Ibid.* As *Anderson* makes clear, the availability of immunity should not turn on how immunity is pleaded any more than it should depend on how the constitutional violation is characterized. Instead, an officer is entitled to immunity unless the contours of the plaintiff's rights are sufficiently clear that a reasonable officer would understand that his actual conduct—"what he is doing"—violates the plaintiff's rights.

the meaning of the Fourth Amendment. See *Anderson*, 483 U.S. at 640 (immunity may be denied only if "a reasonable official would understand that *what he is doing* violates that right," *i.e.*, "the unlawfulness must be *apparent*.") (emphases added); *id.* at 638 ("Our cases * * * generally provid[e] government officials * * * with a qualified immunity as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated").[18]

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[18] In *McNair*, the court of appeals asserted a few other reasons for restricting the scope of the qualified immunity defense in Fourth Amendment cases, but none is consistent with *Anderson*, and none is persuasive. First, the *McNair* court suggested that allowing the defense of immunity in this context—asking "whether a reasonable person would have realized that his conduct violates established legal standards—[would] reintroduce[] the element of subjectivity that *Graham* deliberately removed." *McNair*, 2000 WL 1801253, at *3. This Court rejected that argument in *Anderson*. "[C]ontrary to the Creightons' assertion," this Court stated, application of the no-reasonable-officer test "does not reintroduce into qualified immunity analysis the inquiry into officials' subjective intent * * *. [T]he relevant question in this case, for example, is the objective (albeit fact-specific) question whether a reasonable officer could have believed Anderson's warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed. Anderson's subjective beliefs about the search are irrelevant." 483 U.S. at 641. Second, the *McNair* court suggested that qualified immunity is an extra-statutory "judicial invention" that should be narrowly construed. 2000 WL 1801253, at *4. That rationale is doubly flawed. For one thing, it cannot support expanded liability in cases like this one or *Anderson*, since the *Bivens* cause of action itself was judicially crafted. For another, even in the context of actions under 42 U.S.C. 1983, the Court did not "invent" the qualified immunity defense in the sense in which *McNair* uses that term; instead, the Court recognized the defense as a matter of statutory construction. See *Wood*, 420 U.S. at 316-317 (immunity a matter of "statutory construction" because Section 1983 evidenced no intent to abolish long-standing immunity doctrines). Third, *McNair* suggests that, as a historical matter, the police faced "absolute liability" for any invasion of the rights protected by the Fourth Amendment. 2000 WL 1801253, at *4. But this Court has repeatedly applied qualified immunity in Fourth Amendment cases such as *Anderson* and *Malley*, and in any event expressly rejected the common law rule of strict liability in *Anderson*. There, the plaintiffs claimed that immunity should "not be provided to police officers who conduct unlawful warrantless searches" because "officers conducting

C. The Ninth Circuit's Decision Undermines The Ability Of Courts To Dispose Of Suits Before Trial Under Qualified Immunity

Because qualified immunity is "an *immunity from suit* rather than a mere defense to liability," *Mitchell*, 472 U.S. at 526, one of its central "purposes * * * is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a drawn out lawsuit," *Siegert* v. *Gilley*, 500 U.S. 226, 232 (1991). Consequently, this Court "repeatedly ha[s] stressed the importance of resolving immunity questions at the earliest possible stage in litigation," so that officers do not "err always on the side of caution because they fear being sued." *Hunter*, 502 U.S. at 227, 229 (internal quotation marks omitted).

The Ninth Circuit's approach to qualified immunity—by equating qualified immunity with the ultimate constitutional issue—is inconsistent with that purpose. Under that court's analysis, the reasonableness of any use of force is usually "a question of fact" for the jury; as a result, qualified immunity must be denied unless "the evidence *compels* the conclusion that [the officer's] use of force was reasonable." Pet. App. 15a n.5 (emphasis added).[19] This Court, however, has

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such searches were," at common law, "strictly liable." 483 U.S. at 644. This Court concluded otherwise, explaining that it had "never suggested that the precise contours of official immunity can and should be slavishly derived by the often arcane rules of the common law. That notion is plainly contradicted by *Harlow*, where the Court completely reformulated qualified immunity along principles not at all embodied in the common law * * *." *Id.* at 645. Indeed, the Court continued, "*Harlow* clearly expressed the understanding that the general principle of qualified immunity it established would be applied 'across the board.'" *Ibid.* Nowhere does the decision below or *McNair* explain why excessive force cases should be excepted from *Harlow*'s otherwise "across the board" application.

[19] The Fourth Amendment reasonableness determination, on any particular set of historical facts, is more properly characterized as a mixed question of law and fact. See *Ornelas* v. *United States*, 517 U.S. 690, 696 (1996). In *Ornelas*, this Court held that similar Fourth Amendment mixed fact-law questions, such as whether an officer had reasonable suspicion or

already reversed the Ninth Circuit for adopting a virtually indistinguishable standard in the probable cause context. In *Hunter* v. *Bryant*, the Ninth Circuit held that "[w]hether a reasonable officer could have believed he had probable cause is a question for the trier of fact, and summary judgment * * * based on lack of probable cause is proper only if there is only one reasonable conclusion a jury could reach." 502 U.S. at 228. This Court rejected that formulation because "it routinely places the question of immunity in the hands of the jury." *Ibid.* The Ninth Circuit's formulation of the qualified immunity test here should be rejected for the same reason.

The Ninth Circuit's approach, moreover, turns the immunity inquiry on its head. Summary judgment on qualified immunity in an excessive force case should not be *limited* to cases where the force was so clearly reasonable as to "compel[]" the conclusion that it was lawful. Pet. App. 15a n.5. Quite the opposite: Summary judgment on qualified immunity is *required* if, viewing the facts in the light most favorable to (and resolving all factual disputes in favor of) the plaintiff, a reasonably competent officer could have believed that the force was reasonable. *Malley*, 475 U.S. at 341 (immunity may be denied only "if, on an objective basis, it is obvious that no reasonably competent officer would have concluded" that the conduct was constitutional). In other

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probable cause on the facts before him, are subject to de novo review. See *id.* at 697. See also *United States* v. *Rios*, 88 F.3d 867, 869 (10th Cir. 1996) (Fourth Amendment reasonableness, on a given set of historical facts, is an "ultimate question of law" subject to de novo review); *United States* v. *Mills*, 122 F.3d 346, 348 (7th Cir.) ("[T]he rationale of *Ornelas* cannot be limited, in a principled manner," to the Fourth Amendment issues of reasonable suspicion and probable cause.), cert. denied, 522 U.S. 1033 (1997). This Court has held that the issue of qualified immunity—whether the officer's conduct was proscribed by clearly established law—is a legal issue subject to de novo review. See *Elder* v. *Holloway*, 510 U.S. 510, 516 (1994) ("Whether an asserted federal right was clearly established at a particular time, so that a public official who allegedly violated the right has no qualified immunity, presents a question of law" that "must be resolved *de novo* on appeal.").

words, in deciding qualified immunity, courts must resolve all disputes regarding historical facts—*i.e.*, what actually happened—in favor of the plaintiff, and draw all inferences in the plaintiff's favor. But having identified the most plaintiff-favorable fact pattern supported by the evidence, the court must grant the officer immunity unless, under those facts and pre-existing law, *no* appropriately competent officer could reasonably have believed that the force was lawful. Thus, if there were a fact dispute concerning whether or not an officer gratuitously struck a compliant suspect with a truncheon, qualified immunity would be inappropriate, and obviously so; any belief that the Fourth Amendment permits such undue violence would be patently unreasonable. But where the facts at most raise a reasonable question regarding the lawfulness of the officer's conduct, immunity must be recognized.

For that reason, qualified immunity serves an "important purpose" in helping terminate insubstantial claims at the summary judgment stage. See *Ellis* v. *Wynalda*, 999 F.2d 243, 246 n.2 (7th Cir. 1993). It does not excuse the court from viewing the evidence in the light most favorable to the nonmoving party. But once the facts are so viewed, it permits the entry of judgment not merely where every rational decisionmaker would think the force lawful, but also where "reasonable minds could differ." *Ibid.* As one court of appeals explained, qualified immunity must be granted unless the relevant standards or cases "truly compel (not just suggest or allow or raise a question about), the conclusion * * * that what defendant [allegedly did] violates federal law in the circumstances." *Priester*, 208 F.3d at 927. See also *Hunter*, 502 U.S. at 227 ("qualified immunity shields agents * * * if 'a reasonable officer could have believed'" the conduct "to be lawful"). Because the Ninth Circuit's test inverts that analysis—and precludes summary judgment unless every reasonable officer (and every reasonable judge or juror) would agree that the force was proper—it impermissi-

bly prevents qualified immunity from serving as an immunity to suit, and reduces it to a mere defense to liability.

II. THE COURT OF APPEALS ERRED IN DENYING QUALIFIED IMMUNITY IN THIS CASE

This case illustrates the danger of equating the Fourth Amendment and qualified immunity inquiries. As the district court noted, Specialist Saucier asserted qualified immunity for (1) the "degree of force used to remove [respondent] from the crowd," and (2) the force used to "place [respondent] inside the van." Pet. App. 29a. See also *id.* at 27a (analyzing the two uses of force). The court of appeals in this case held that Specialist Saucier was not entitled to qualified immunity for those uses of force "because the amount of force he used" was not "so minimal that it was *per se* reasonable." Pet. App. 14a-15a. Whatever one might think of the constitutionality of the force Specialist Saucier used in the circumstances that confronted him, that force was not so clearly unlawful under prior law that Saucier could not have reasonably thought it lawful. To the contrary, the Ninth Circuit's conclusion that the force used was unreasonable comes perilously close to establishing a new—and unjustified—rule that officers may not use any physical force to restrain detainees when effectuating a seizure in contexts like this one.

A. Specialist Saucier's Use Of Force To Detain Respondent Did Not Violate Clearly Established Constitutional Rights

The first use of force challenged by respondent is the force Specialist Saucier, together with Sergeant Parker, employed to remove respondent from the crowd at the Presidio. It is not disputed that, as respondent unfolded his banner near the platform where the Vice President was speaking, Saucier and Parker each took one of respondent's arms, lifted him partially off the ground, and rushed him out of the crowd to a waiting military van. See Pet. App. 4a, 24a-25a; *id.* at

27a (describing videotape); pp. 3-4, *supra*. The Ninth Circuit denied Saucier's claim that he was entitled to immunity for that conduct, concluding that "no reasonable officer could have believed that" grasping respondent's arm "without warning or speaking to" him, and partially carrying respondent from the crowd, "was necessary under the circumstances," *id.* at 15a, because respondent's crime was not serious and respondent did not pose an immediate threat to public safety. The court stated:

> Unfurling a banner at a public event does not appear to be a particularly severe crime. Katz was sixty years old and wearing a leg brace. There is no indication he was armed or dangerous. From all that appears at this stage of the case, he did not pose an immediate threat to the safety of the officers or anyone else.

Ibid.

By holding that the use of such minimal force is not only unreasonable, but *so obviously* unreasonable that no officer could have thought it lawful, the Ninth Circuit has effectively held that, in cases like this, officers are prohibited from using *any force at all* to make an arrest. That suggestion is difficult to reconcile with this Court's decision in *Graham*, which recognizes "that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." 490 U.S. at 396. It is contrary to the decisions of other courts of appeals, which uphold as reasonable applications of force that are significantly more intrusive where, as here, no injury results.[20] And it appears to contravene the

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[20] See, *e.g.*, *Curd* v. *City Court of Judsonia*, 141 F.3d 839, 841 (8th Cir.) (where officer "seized [arrestee's] arm, spun her around and told her to get into the police car," the "limited amount of force" was not "objectively unreasonable" under *Graham*, "[e]ven if * * * unnecessary to effect the arrest," especially given that the plaintiff "does not allege, and there is no evidence, that she was injured or experienced physical pain"), cert. denied, 525 U.S. 888 (1998); *Hinton* v. *City of Elwood*, 997 F.2d 774, 781 (10th Cir.

policies of numerous law enforcement agencies, which require officers to apply some physical restraint, such as handcuffs, when arresting individuals to ensure that those individuals do not pose a danger to the officers or themselves.[21]

The Ninth Circuit's ruling, moreover, blinks reality. The officers in this case, charged with ensuring the safety of the Vice President, who was standing steps away, had a split second to react to respondent's movement toward and at the barrier that separated the crowd from the Vice President.

1993) (officers did not violate constitutional norms where they grabbed plaintiff from behind, announcing he was under arrest, and used increased force when he resisted); *Williams* v. *Bramer*, 180 F.3d 699, 703-704 (5th Cir. 1999) (declining to find Fourth Amendment violation absent injury where force was, in context, relatively minimal). Indeed, the Eleventh Circuit has, in a long line of qualified immunity cases, repeatedly applied the "de minimis" label to uses of force that exceed the amount used in this case. *Nolin* v. *Isbell*, 207 F.3d 1253, 1255-1258 (2000) (summarizing). See, *e.g.*, *Jones* v. *City of Dothan*, 121 F.3d 1456, 1460 (11th Cir. 1997) (immunity proper where officer "slammed" the plaintiff against a wall and "kicked his legs apart," causing him to suffer pain).

[21] See, *e.g.*, Federal Bureau of Investigation, *Manual of Investigative Operations and Guidelines*, Pt. II, § 11-1.5 (effective May 26, 1989) ("[I]t is required that all arrested persons be handcuffed."); International Ass'n of Chiefs of Police/National Law Enforcement Policy Center, *Model Policy on Transportation of Prisoners* (Oct. 1, 1997) ("Officers shall handcuff (double-locked) all prisoners."). For that reason, in *Limbert* v. *Twin Falls County*, 955 P.2d 1123 (1998), the Idaho Supreme Court rejected a constitutional challenge to a Sheriff Department policy of handcuffing all arrested individuals, even if they appear to be "non-threatening," and even as applied to a woman who suffered from asthma and cystic fibrosis. "Even the most meek-appearing and fragile suspect," the court explained, "may have the ability to place the officer, the public, and the suspect at great risk." 955 P.2d at 1127. In this case, both Specialist Saucier and Sergeant Parker were keenly aware of that fact. See J.A. 41 ("Any person can be a physical threat.") (Saucier Dep.); J.A. 53 (respondent "could have been a danger to a lot of different people" if he were "loose" with "a weapon") (Parker Dep.). There may be special situations in which the reasonable amount of force is limited to the application of handcuffs or similar restraints. This case, however, does not present that issue. The minimal amount of force the officers employed to obtain control over and remove respondent from the crowd was not unreasonable, and surely was not so unreasonable that no competent officer could have thought it lawful.

They were confronted with an individual who was openly flouting the law; they faced the possibility of escalation, in view of the presence of other potential protestors in the large crowd; and they could not know for certain how respondent himself might react to them. Accordingly, they used surprise to their advantage by quickly seizing respondent and whisking him away. The court of appeals concluded that such a strategy was unreasonable because, in its view, the officers should have "warn[ed] or sp[oken] to" respondent first. Pet. App. 15a. In hindsight, speaking to respondent before seizing him may have been a reasonable alternative. But it also could have produced resistance, flight, escalation, or a commotion.[22] We know of no decision of this Court holding that the police, confronted with a suspect who openly defies the law, must discuss the possibility of seizure with him in advance, and may not use surprise to take him into custody quickly and with minimal disturbance. Moreover, even if the Fourth Amendment and *Graham* could be construed as imposing such a requirement, Specialist Saucier is entitled to qualified immunity, since he could not be said to have been "plainly incompetent" or "knowingly violating the law" for failing to anticipate and conform his conduct to it under the circumstances he confronted. *Malley*, 475 U.S. at 341.

The court of appeals, moreover, fundamentally erred by employing hindsight to second-guess the perceptions and actions of the officers on the scene. Fourth Amendment and qualified immunity issues, this Court has admonished, must be examined from "the perspective of a reasonable officer on the scene," *Graham*, 490 U.S. at 396, and should not be reconstructed in view of the more expansive knowledge that

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[22] See J.A. 44 (Saucier Dep.) (goal was to avoid "draw[ing] that much attention" if the officers "didn't have to"; officers wanted to "diffuse the situation" by getting respondent "into the van as quickly as possible"); J.A. 67 (Lee Dep.) (officers "were supposed to diffuse the situation," if necessary by "removing that person as quickly as possible").

extensive litigation and leisurely examination can produce years later, see *Hunter*, 502 U.S. at 228 ("the court should ask whether the agents acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact"). In this case, the court of appeals repeatedly ignored those admonitions. First, without acknowledging the atmosphere of uncertainty confronting the officers, the court of appeals faulted their treatment of respondent because, "at this stage of the case," it "appears" that respondent posed no "immediate threat." Pet. App. 15a. See also *ibid.* (relying on the fact that "[t]here *is* no indication" that respondent was armed or dangerous) (emphasis added). The relevant question, however, is not what "appears" now, after years of litigation; the question instead is what the officers knew at the time. *Hunter*, 502 U.S. at 228. As explained above, in the split second Saucier and Parker had, they could not predict how respondent would react to being detained; nor could they know what he might have had concealed in his clothing. J.A. 50, 53, 59 (Parker Dep.); pp. 44-45 & note 21, *supra*. Moreover, the fact that an officer does not have reason to believe that a suspect is armed merely precludes him from using *deadly* force. See *Garner*, 471 U.S. at 11. The absence of such suspicion, however, has never been held to preclude an officer from using a modicum of force to seize a suspect like respondent who, in the officer's presence, is flagrantly and knowingly violating the law. For the same reasons, the court of appeals erred in attributing significance to the fact that respondent was wearing a leg brace. Pet. App. 15a, 27a. There was no evidence that either officer was aware of the brace, and respondent himself testified that the brace was *underneath* the leg of his trousers. J.A. 21 (Resp. Dep.); J.A. 52 (Parker Dep.); J.A. 38-39 (Saucier Dep.). Finally, although respondent denies resisting arrest, his undisputed conduct—he anchored himself to the barrier that separated

him from the Vice President as the officers attempted to gain control over him—surely justified the belief that some force could be used to remove him.[23]

Given the above considerations, there is substantial reason to question the Ninth Circuit's legal conclusion that, viewing the facts most favorably to respondent, Specialist Saucier employed objectively unreasonable force to apprehend respondent. In our view, under the circumstances of this case, the conclusion that Saucier violated the Fourth Amendment by using minimal force to remove respondent from the crowd—force that produced no physical injury—is all but foreclosed as a matter of law. See pp. 43-45 & notes 20-21, *supra*. But in this case and in others there may be differences of opinion about the ultimate constitutional question, and it is precisely such cases that underscore the importance of distinguishing the test for qualified immunity from the test for finding a constitutional violation. If the court of appeals had addressed the two questions separately, it would have stopped for a moment after finding the constitutional violation and asked a critical question—whether its conclusion that the force was unconstitutional was so obvious in advance that reasonable officers (or reasonable judges) could not have disagreed. Whatever one might say of the Ninth Circuit's conclusion that Specialist Saucier's use

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[23] Respondent testified that, as the officers took hold of him, he held his banner in place on the barrier that separated him from the Vice President, attempting to prevent its removal; that action necessarily held him in place as well. See J.A. 23 ("I just held it in place while I think they had their arms around me"); J.A. 24 ("Q. Did you try to prevent the banner from being taken away from the railing, taken off the railing? A. * * * I think I did, but it got pulled away real quick."). As a result, both officers testified that respondent attached himself to the barrier, necessitating his removal. See J.A. 38 (Saucier Dep.) ("He tried to keep himself anchored at the front of the seating area."); J.A. 51 (Parker Dep.) ("[H]e took his hands and put them on the barricade. And I was trying to pull him off the barricade."); J.A. 53 (Parker Dep.) ("[A]s I went up to the barricade * * * and I put my arms around him * * * he clenched onto the bars").

of minimal force to apprehend respondent was unreasonable, the use of that force was not sufficiently beyond the bounds of potentially lawful conduct that "no reasonably competent officer would have concluded" it to be lawful. *Malley*, 475 U.S. at 341. To the contrary, because it is far from obvious that Saucier's conduct was unlawful at all, much less clearly unlawful in light of pre-existing law, he is entitled to qualified immunity under *Anderson*, 483 U.S. at 640.

B. Saucier's Placement Of Respondent Into The Van Did Not Violate Respondent's Clearly Established Rights

Alternatively, the Ninth Circuit seems to have concluded that the force used to place respondent in the van was constitutionally unreasonable. In particular, the court noted that respondent had denied resisting and therefore concluded that it may not have been necessary to push respondent inside. Pet. App. 15a. Once again, however, the court of appeals erred by examining the facts as we know them today, rather than examining the facts as they were perceived by the officers at the time—including undisputed evidence of conduct that reasonably led the officers to conclude that respondent was resisting being placed in the van.[24]

Even if we set aside that error, Specialist Saucier is entitled to qualified immunity. As this Court has held, "'[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers,' *Johnson* v. *Glick*, 481 F.2d [1028, 1034 (2d Cir.), cert. denied, 414 U.S. 1033 (1973)], violates the Fourth Amendment." *Graham*, 490 U.S. at 396. *A fortiori*, the single push at issue here, even if later deemed unnecessary, cannot be so clearly unconstitutional as

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[24] It is not disputed that respondent took actions that could have created the appearance of resistance: Specialist Saucier testified that respondent resisted by putting his feet on the van's bumper and pushing away, J.A. 39-40 (Saucier Dep.), while respondent testified that he put his feet on the van's entry or the bumper as the officers attempted to place him inside, J.A. 26 (Resp. Dep.).

to defeat qualified immunity. Nor does it matter that respondent, in his complaint, alleged that he was shoved "violently" or that he was "almost" injured. See Pet. App. 15a. Respondent was not injured, and merely quoting the adverb "violently" from the complaint cannot substitute for reasoned analysis of whether the evidence shows force that was so clearly excessive as to render qualified immunity inappropriate. See Fed. R. Civ. P. 56(e) (party may not "rest upon the mere allegations" of a pleading to defeat a properly supported motion for summary judgment).[25] Here, after reviewing a videotape of the actual events in question, the district court declared that, when viewed "in a light most favorable to" respondent, the tape showed the officers "removing" respondent from the crowd, "carrying or pulling him" toward the van, and "push[ing]" or "placing" him inside. Pet. App. 27a. The videotape itself, copies of which have been lodged with the Court, confirms that analysis, and dispels the notion that the allegedly "violent" shove of which respondent complains was so excessive as to be clearly and obviously unlawful. It may have been forceful, and it may have departed from model police conduct. But not every departure from model conduct violates the Constitution and, under the circumstances, there was good reason to believe that such force was necessary. See note 24, *supra*. In any event, the push certainly did not extend "so far beyond" the sometimes "hazy border between excessive and acceptable force that," under the circumstances, an officer would have

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[25] The characterization of the push as "violent[]," even if accepted, does not itself establish that qualified immunity should have been denied. Black's defines "violently" as "[b]y the use of force; forcibly," *Black's Law Dictionary* 1570 (6th ed. 1990), and "violent" as "characterized" by "physical force, especially by extreme and sudden or by unjust or improper force." *Ibid.* Consequently, the inclusion of the word "violently" in the complaint merely underscores the fact that the push involved force, and potentially "unjust and improper" force. It does not demonstrate that the force used was so extreme and unjustified that no reasonable officer could have thought it lawful.

"to know he was violating the Constitution." *Priester*, 208 F.3d at 926. See *Harlow*, 457 U.S. at 818 (officer entitled to immunity unless reasonably competent official would "fairly be said to 'know' that the law forbade [the] conduct"). See pp. 43-44 & notes 20-21, *supra*.

In any event, it is hard to see how the supposedly violent push of which respondent complains is relevant to *Specialist Saucier's* claim of immunity. It is undisputed that the allegedly forceful push did *not* come from Saucier. Instead, as the videotape and the depositions attest—and as respondent does not deny—that push came from Sergeant Parker.[26] Nowhere did the Ninth Circuit offer any reason for holding Specialist Saucier, the only petitioner in this case, liable for Parker's conduct. Consequently, viewing the evidence in the light most favorable to respondent, the only question here is whether Saucier's conduct of placing respondent into the van from the left hand side—not Parker's allegedly violent push from the right—violated respondent's Fourth Amendment rights. It did not, and a reasonable officer in Saucier's position surely could have believed that to be the case.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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[26] The videotape shows the allegedly violent push coming from the officer on the right hand side, as respondent is placed into the van. It is not disputed that Sergeant Parker appears on the right side of the screen, and that Specialist Saucier appears on the left, wearing glasses. See J.A. 42-43 (Saucier Dep.); J.A. 56, 58 (Parker Dep.). We pointed that out in our petition for a writ of certiorari (at 27-28 & n.19), and respondent—although identifying other facts allegedly in need of clarification in his brief regarding certiorari—did not contend otherwise.

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JANUARY 2001

FEB 16 2001

No. 99-1977

Supreme Court, U.S.
FEB 16 2001
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In The

Supreme Court of the United States

DONALD SAUCIER,

Petitioner,

v.

ELLIOT M. KATZ AND
IN DEFENSE OF ANIMALS,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether, in a case alleging the use of constitutionally unreasonable force, the test for qualified immunity and the reasonableness test under the Fourth Amendment are identical, or merge, so that, if there is a material issue of fact precluding summary judgment, it is for the jury to decide when a federal government official has used excessive force in violation of the "objective reasonableness" standard of *Graham v. Connor*.

2. Whether the Seventh Amendment requires that when a person has had physical force used against him or her by a federal officer, and there is a material issue of fact as to whether the use of force was excessive, there is a right to have a jury decide if the use of force was objectively reasonable.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 194 F.3d 962. The opinions of the district court (Pet. App. 17a-64a) are unreported.

JURISDICTION

Respondent joins in the jurisdictional statement of the Petitioner.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Seventh Amendment to the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of common law.

STATEMENT

On September 24, 1994, the public was invited to attend a special presentation by Vice President Gore and other speakers on the main post at the Presidio.[1] The event was to celebrate the Presidio's historic transfer from military post to national park on October 1, 1994. The conversion of the Presidio was a subject of public controversy, with animal rights activists concerned about the proposed use of the Army's Letterman Hospital for animal experimentation.

On the day of the celebration, Defendant Saucier was working as a military police officer. In his deposition, Saucier testified that he had been told by superiors that demonstrations would not be allowed. (Joint Appendix, hereafter, "J.A.") Saucier admits that Dr. Katz was "pointed out as one of the potential, you know, activists" and that he knew "who this person was . . . the person we needed to keep an eye on." J.A. 35-36

At the September 24 presentation, Dr. Katz, a veterinarian who was then sixty years old, and other members of In Defense of Animals (hereafter "IDA") were among the several hundred members of the public who attended

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[1] The public invitation included newspaper and radio advertisements in addition to mailings and a special toll free number for the public to find out about how to get to the event. The Presidio was already an open military base near the foot of the Golden Gate Bridge with thousands of civilians passing through daily without being stopped or checked in any other way. Judge Peckham had previously ruled in *CCCO-Western v. Fellows*, 359 F. Supp. 644, 649-650 (N.D. Cal. 1972), that the Presidio was an open base and, therefore, some first amendment activity had to be allowed.

the event. Dr. Katz was wearing a knee-high leg brace and no shoe because of a fractured foot. J.A. 20-21 He was sitting in the front of the crowd behind a gate and waist-high cyclone fence which blocked the public from the stage. As Vice President Gore began speaking about the Presidio becoming a global learning center, Dr. Katz, without saying anything, removed a cloth banner approximately 4 feet by 3 feet which stated: "Please Keep Animal Torture Out of Our National Parks" with the intent of displaying the banner by hanging it over the fence so that it could be read by Vice President Gore and the other speakers.

Before the banner could be placed so that it could be seen, one military police officer grabbed Dr. Katz from behind, and another tore the banner away. These individuals were Defendant Saucier and Steven Parker, an Army sergeant. Dr. Katz did not try to prevent the officers from taking the banner. The two military police officers then each took one of Dr. Katz's arms and aggressively half-carried, half-dragged Dr. Katz in a "bum's rush" to a military police van. J.A. 23-24.[2] Once at the military van, Defendant Saucier and Steven Parker violently threw Dr. Katz into the van.[3] As he was thrown into the van, Dr.

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[2] Contrary to the lengthy discussion by Petitioner assuming that Respondent is alleging excessive force separately for the way that Dr. Katz was carried to the van, Respondent is not claiming that merely his being dragged/carried with a splint on his foot was excessive force. Rather, it was the totality of the circumstances and particularly it was the gratuitous violent shove that Dr. Katz was given that was excessive.

[3] Defendant Saucier and Dr. Katz offer a markedly different description of these facts. Defendant Saucier states that despite

Katz was just able to protect himself from smashing into the floor or back of the van.[4]

The military police officers never spoke to Dr. Katz. He was kept in the van for about twenty minutes. They then drove Dr. Katz to a military police station. After being briefly detained, Dr. Katz was released and allowed to drive home. Dr. Katz was never informed of the basis for his detention or cited with any violation of any law or regulation.

Respondents accept Petitioner's statement of the procedural history of the case.

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the broken foot, knee-high brace and lack of a shoe, Dr. Katz resisted "by sticking his legs up on the bumper and pushing away." J.A. 39-40. Because of this resistence, Saucier states, "we had to use our heads putting him in the back of the vehicle." *Id.* Dr. Katz denies resisting in any way. J.A. 25 (Q. And when you got to the vehicle, what happened? A. They pretty much threw me in. Just shoved me in. Q. Did you attempt not to get put in? A. No.) The videotape corroborates his testimony. Parker did not testify that Dr. Katz resisted being put into the van. Instead he said that he used the minimum force necessary. J.A. 56.

[4] Saucier also claims that it was only Parker who gave Dr. Katz the shove, however, Saucier admitted in his deposition that he and Parker *both* put Dr. Katz into the van together. J.A. 39 (Q. And then once you got to the van, did you put him into the van? A. Did I put him in personally? I assisted putting him in the van. Q. Is it fair to say that you both put him into the van together? A. Yes, sir.) Parker also testified that Saucier helped. J.A. 55 (Q. Okay, did anyone help you to put Dr. Katz into that vehicle? A. Saucier helped me.)

SUMMARY OF ARGUMENT

Petitioner's brief is long on discussion and short on application. Legal reasoning should become more clear the higher the court. Lower courts need guidance, not abstraction. If applied, Petitioner's convoluted argument would unnecessarily supplant the well reasoned and well working case of ***Graham v. Connor,*** 490 U.S. 386 (1989) and in its place create a new and confusing judicial determination based on qualified immunity that second guesses the jury in violation of the Seventh Amendment. Rather than supplanting *Graham,* Respondents offer an application of *Graham* which satisfies the concern that all parties share that federal officials do not "exercise their discretion with undue timidity," *Wood v. Strickland,* 420 U.S. 308, 321 (1975), while abiding by the mandate of the Seventh Amendment. *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 352 (1978) ("The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts." Rehnquist, J., dissent, quoting *Jacob v. New York,* 315 U.S. 752, 753 (1942)); *Monterey v. Del Monte Dunes at Monterey, Ltd.,* 526 U.S. 687, 730 ("The Seventh Amendment . . . entitle[s] the parties to a jury trial in actions for damages to a person or property . . . " Scalia, J. concurring, quoting *Ross v. Bernhard,* 396 U.S. 531, 533 (1970)).

Graham achieves this mixture of providing police officers the confidence they need in order to do their difficult job, while preserving the right to a jury trial when there is a genuine issue of material fact whether excessive force

was used. *Graham* instructs the lower courts that the threshold showing that an officer has not acted in an objectively reasonable manner is a high one. It is not enough to show that using 20/20 hindsight the officer could have made a better choice. *Graham v. Connor*, 490 U.S. 386, 397 (1989) ("reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.") By not allowing second guessing and arm chair quarter-backing *Graham* insures that officers will be insulated by making "allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain and rapidly evolving" *Id.* and providing "ample room for mistaken judgments." *Id.* Further, *Graham* also stands for the proposition that an officer does not need to use the least amount of force available, "[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers violates the Fourth Amendment" *Graham* at 396-97 (quoting *Johnson v. Glick*, 481 F.2d 1028, 1034 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973)).[5]

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[5] Circuit courts, in a variety of situations, have followed *Graham*'s lead holding that an officer does not have to use the minimum amount of force. *Forrett v. Richardson*, 112 F.3d 416, 420-21 (9th Cir. 1997), *cert. denied*, 118 S.Ct. 1366 (1998) (shooting violent felony suspect was reasonable even if his capture through other means was inevitable); *Forrester v. City of San Diego*, 25 F.3d 804, 807-08 (9th Cir. 1994), *cert. denied*, 513 U.S. 1152 (1995) (use of "pain compliance techniques" to remove protestors was reasonable); *Plakas v. Drinski*, 19 F.3d 1143, 1148-49 (7th Cir.), *cert. denied*, 513 U.S. 820 (1994) (shooting of suspect was reasonable; officers not required to use available alternatives). Following *Graham*, these cases stand for the

The problem with Petitioner's long argument about the need to expand *Anderson v. Creighton*, 483 U.S. 635 (1987) is that it disregards the fact that *Graham* is already doing the job. ***Graham* works!** At most *Graham* needs reemphasis through this Court's opinion. Petitioner overlooks that *Anderson v. Creighton*, 483 U.S. 635 (1987) **came before *Graham v. Connor***, 490 U.S. 386 (1989). *Graham* has addressed for the excessive force area most of the concerns expressed in *Anderson*. The carry-over of legal reasoning from *Anderson* into *Graham* can be seen from Justice Scalia's opinion for the Court in *Anderson* using the phrase "objectively legally reasonable" *Anderson*, 483 U.S. at 641, and Chief Justice Rehnquist's use in *Graham* of the phrase "objective reasonableness." *Graham*, 490 U.S. at 397. Both cases at their core seek to balance the concern that "actions for damages may offer the only realistic avenue for vindication of constitutional guarantees," with the concern that "permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Anderson*, 483 U.S. at 638.

Graham, along with the many cases that have both relied and built upon it,[6] along with this Court's

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proposition that even where the officer uses more force that the bare minimum necessary to take someone into custody, his conduct may be objectively reasonable.

[6] There is extensive case law following *Graham*. *Graham* has been cited 2,685 times in subsequent cases. This Court should be extremely reluctant to now adopt a new, supposedly higher, but not really, standard that will throw into question all that has

instruction that "insubstantial claims against government officials be resolved prior to discovery and on summary judgment if possible," *Anderson v. Creighton*, 483 U.S. 635, 640, fn. 2 (1987) gives the trial courts plenty of guidance, *and the language needed*, to dispose of cases prior to or at summary judgement. This combination of cases amounts to a high threshold showing by plaintiff to avoid summary judgment in a Fourth Amendment case attempting to hold an officer responsible for the use of excessive force. Further expansion of *Anderson* into the area of excessive force is unnecessary and unwise.

Where the case does proceed beyond summary judgment and to trial, *Graham* still provides a high threshold of protection for officers through jury instructions. Based upon the cases previously discussed, officers are entitled to a number of exculpatory instructions including "evidence of a mistake is not enough," "no 20/20 hindsight to second guess an officer," "officers do not need to use the least amount of force necessary," "not every push or shove is a violation of the Fourth Amendment," "officers are entitled to an allowance for making split-second decisions." *Graham v. Connor*, 490 U.S. at 396.

The simple truth is that these instructions in sum add up to a formidable defense at closing argument – a

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been accomplished with *Graham*. From its inception *Graham* has been, and remains, a landmark case because it has left a legacy, taking a complex body of conflicting law (circuits could not even agree to an objective or subjective test for excessive force cases prior to *Graham*) and enunciating a clear, workable, standard for the trial courts. This accomplishment goes unrecognized in Petitioner's argument.

defense so strong that only a foolish plaintiff's lawyer takes a case with weak facts to begin with and if they last through summary judgment (which they usually will not), will most likely lose at trial.[7] Right from the beginning of voir dire it is typical for jurors to be asked about their understanding of the difficult job of law enforcement. Thereafter, the jurors' natural inclination to sympathize with the tough circumstances that officers face is reinforced by instructions that officers should not be second guessed and allowance must be made for "split-second decisions." One of the main reasons that *Graham* works is that it truly does provide broad protection for police officers.

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[7] There is another disincentive for counsel to represent a plaintiff in an excessive force case. According to the government, plaintiff cannot recover fees in an excessive force case against federal officials. *Kreines v. United States*, 33 F.3d 1105, 1109 (9th Cir.), *cert. denied*, 513 U.S. 1148 (1995). It is worthwhile to insulate officers so that they are not timid in the performance of their duties, but this Court also needs to consider the reality of what is happening in the courtrooms of America. No counsel can afford to take a case where it is certain that the government will move to dismiss on qualified immunity grounds, then appeal, and even if the case is eventually remanded and won at trial there is no award of fees. This case is a fine example. The video shows a 60-year-old man who quietly took out a banner be grabbed, dragged, and violently shoved into the back of a military vehicle. The government should have apologized and offered him a small sum. Instead the government said we will fight you all the way to the Supreme Court and you will never get paid even if you win. Respondents' counsel has worked for five years out of duty to their clients and because of the gravity of the issues at stake. If the qualified immunity bar is boosted again what counsel is going to even try to clear it?

It is understandable that Petitioner does not discuss the procedural application of *Graham* because when that is done, it is clear that they are asking this Court to fix a non-existent problem at the expense of the Seventh Amendment. Having represented officers as well as plaintiffs, Respondents' counsel is well aware that present instructions enable counsel to encourage the jury in closing to give an officer the benefit of the doubt and a break for an honest mistake – again as it should be.

There is, however, a problem that does need repair. The problem that exists at the trial level is the morass that is created when defense counsel loses, even with all the benefit of the *Graham* instructions, and then tries to get the trial judge to lower the directed verdict standard by using a qualified immunity analysis. *McNair v. Coffey*, 234 F.3d 352 (7th Cir. 2000) (holding that it is error for the trial court to second guess the jury and enter directed verdict based upon qualified immunity). Judge Easterbrook's opinion for the court, decided on December 8, 2000, provides timely, thoughtful, reasoning for this Court to follow. McNair acknowledges that "[f]or many years the analysis of excessive-force claims was beset by legal uncertainty. . . . Uncertainty about the legal standard ended, however, with the Supreme Court's opinion in *Graham*, which adopts an objective approach under the Fourth Amendment. . . . *Graham* makes the norm as clear as the judiciary can achieve. . . . " *McNair*, 234 F.3d at 354.

After recognizing what a fine job *Graham* has done, the court in *McNair* goes on to agree with the Ninth Circuit's decision in this case that "once a jury has determined under the Fourth Amendment that the officer's conduct was objectively unreasonable, that conclusion

necessarily resolves for immunity purposes whether a reasonable officer could have believed that his conduct was lawful." *McNair*, 234 F.3d at 355. The court's reasoning in *McNair* follows that of the Ninth Circuit and the majority of other circuits. In application, the qualified immunity reasonableness analysis and the *Graham* reasonableness analysis are not only well reasoned but also practical because they allow *Graham* to continue the job it has done so well facilitating the smooth functioning of the trial courts in excessive force cases.

Retaining the legacy of *Graham* is reason enough to conclude that the two reasonableness inquiries merge; however, there are additional Seventh Amendment limitations that require this result. The Seventh Amendment right to jury trial precludes the argument made by Petitioner that qualified immunity creates a directed verdict at a standard which is lower than that of Rule 50 when a jury has found a violation of the Fourth Amendment. Petitioner refuses to address the ramifications of the legal standard he asks this Court to adopt. Counsel for the Respondents made it clear in their response to Petitioner's Writ for Certiorari that grave Seventh Amendment issues arise from Petitioner's argument. Response to Petitioner's Writ of Certiorari, pg. 4 ("Any outcome that allows the judge to second-guess the jury after it has applied the *Graham* standard is the height of judicial activism and violates the Seventh Amendment"). Nonetheless, Petitioner's brief does not include a single word discussing the Seventh Amendment.

The only instance in which the Petitioner has addressed the issue of how the trial court would need to second guess the jury is in their Reply Brief on Petition

for a Writ of Certiorari. Their response is essentially that the Court's second guessing would be not be different or violate the Seventh Amendment than the Court entering a directed verdict under Rule 50. This response is disingenuous. The evaluation that the court would make for qualified immunity would be different, *and lower*, than the standard that must be met for directed verdict under Rule 50.

Under Rule 50, the court can only direct a verdict if "no reasonable jury could have reached that result." Fed. R. Civ. P. 50.[8] The qualified immunity standard does not require that level of deference to the jury. The Respondents seek to achieve a lower standard for directed verdict by having the trial court review the jury's decision using a qualified immunity analysis instead of the same Fourth Amendment question the jury addressed. Rule 50 only allows the trial court to review the same question that the jury made – using the high deferential standard – and not embark on a different and supposedly more protective inquiry. Directed verdict does implicate the Seventh Amendment and, therefore, has a very high threshold. Any standard below the Rule 50 standard violates the Seventh Amendment.

This is exactly the type of second guessing that Patrick Henry and other anti-federalists insured against by demanding the trial by jury in all trials, including civil

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[8] 9 J. Moore, *Moore's Federal Practice* para. 50.05 (3d ed. 1999).

trials, as part of the quid pro quo for ratifying the constitution.[9] The historical record is clear that the intent of those arguing for an amendment providing for a trial by jury was in large part to insure that a person wronged by a federal official can turn to their peers to decide when there has been an abuse of federal authority. Under the Fourth Amendment, the federal officials have the right to arrest a person and to use force against that person to make the arrest, but the person has the right to call upon their peers, in their state, to decide if the use of force was excessive.[10]

Judges serve the most important role as the guardians of the Constitution, and it is not palaver to say that this case is a prime example. But federal judges are federal officials. They are paid from the federal treasury just like other federal officials. This comment is in no way a disparagement upon the federal judiciary, the federal judiciary has a well-deserved reputation for impartiality, nonetheless, citizens have the right to have their peers decide when federal officials have used excessive force. It is not that federal judges cannot be trusted; it is simply not their role.

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[9] *Galloway v. U.S.*, 319 U.S. 372, 397, (1943) provides some of this history, including the statement by Patrick Henry that " 'trial by jury is the best appendage of freedom. . . . No appeal can now be made as to fact in common law suits. The unanimous verdict of impartial men cannot be reversed.' " (*emphasis original*, in case, citing Elliott's *Debates*, 324, 544).

[10] As Thomas Jefferson wrote, trial by jury is "one of the fetters against doing evil, which no honest government should decline." *The Letters of Thomas Jefferson: 1743-1826*, to Alexander Donald, Paris, February 7, 1788.

Fortunately it is easy for this Court to decline Petitioner's urging to make a decision that would undermine the Seventh Amendment since *Graham* already works so well. A simple reemphasis of *Graham* along with some guidance on jury instructions will balance the concern that "actions for damages may offer the only realistic avenue for vindication of constitutional guarantees," with the concern that "permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Anderson*, 483 U.S. at 638.

ARGUMENT

I. *GRAHAM* AND ITS PROGENY WORK WELL SO THERE IS NO REASON FOR THIS COURT TO SUPPLANT *GRAHAM* WITH A NEW, HIGHER, STANDARD OF QUALIFIED IMMUNITY.

A. Development of Fourth Amendment Excessive Force Standard

Prior to 1989, "the analysis of excessive-force claims was beset by legal uncertainty." *McNair v. Coffey*, 234 F.3d at 355. "Some courts analyzed these claims under the fourth amendment, some under the fifth," *Id.* This Court observed that although the Fourth Amendment and Eighth Amendment arguably provided the most textually obvious sources of constitutional protection, most courts followed the holding of Judge Friendly in *Johnson v. Glick*, 481 F.2d 1028 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973), finding that the constitutional protection arose from the substantive due process protections of the Fifth Amendment.

Consistent with this underlying source of the right, liability arose where the officer's use of force "shocked the conscience." *Graham*, 490 U.S. at 393. In addition to the uncertainty as to the underlying source of the protection, the "conscience-shocking" conduct standard proved to be "very hard to pin down in practice." *McNair*, 234 F.3d at 355.

This uncertainty was removed by this Court through the decision in *Graham v. Connor*, 490 U.S. 386, 393 (1989). *Graham* held that for free citizens (as compared to prisoners), whatever the setting, the right against use of excessive force by government officials derived from the Fourth Amendment and must be assessed under an objective reasonableness standard. *Id.* at 395 ("Today we . . . hold that all claims that law enforcement officers have used excessive force – deadly or not – in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard.")

In *Graham*, as here, the defendant claimed the plaintiff suffered no discernable injury. In *Graham*, a diabetic man felt the onset of an insulin reaction (falling blood sugar) and wanted to purchase orange juice. *Graham v. Connor*, 490 U.S. at 388. Upon entering the convenience store and seeing a number of people ahead of him in line, he hurried out of the store and returned to his friend's automobile and asked to be driven to a friend's house. An officer who saw the hasty exit from the store, stopped the car, handcuffed the diabetic man, put him face down on the hood of the car and then threw him face first into a police car. After receiving a report that the man had done nothing wrong at the store, he was driven home and

released. He subsequently sued for violation of his rights under the Fourth Amendment. At the close of the evidence, the trial court granted a directed verdict finding that the amount of force used was appropriate, did not inflict any discernable injury and was not applied maliciously or sadistically. *Id.*, at 390-91.

Chief Justice Rehnquist, writing for a unanimous Court reversed, holding that claims of excessive force must be decided under an objective reasonableness standard under the Fourth Amendment. *Id.* at 395. Further, the Court provided a detailed discussion further clearly establishing the law for applying the objective reasonableness standard. The Court held that "the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application, however its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* at 396.

Further, the Court emphasized that the "reasonableness of a particular use of force must be judged from the *perspective of a reasonable officer on the scene*, rather than with the 20/20 vision of hindsight." *Id.* at 396 (emphasis supplied). Further, "the same standard of *reasonableness at the moment applies*: Not every push or shove, even if it may later seem unnecessary in the peace of the judge's chambers violates the fourth amendment." *Id.* (emphasis supplied). Finally, the Court held that "the calculus of reasonableness must embody allowance for the fact that

police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Id.*

The Court ended this section of the decision by emphasizing that the " 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officer's actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* at 397. Because the trial court and the Court of Appeals applied a subjective standard, the directed verdict in favor of the officer was reversed and the matter was remanded.

Following *Graham*, lower courts have enriched this understanding by rulings in various factual permutations which make clear that the Fourth Amendment provides officers with wide latitude to determine the amount of force that is reasonably necessary. *See Forrett v. Richardson*, 112 F.3d 416, 420-21 (9th Cir. 1997), *cert. denied*, 523 U.S. 1049 (1998) (shooting violent felony suspect was reasonable even if his capture through other means was inevitable); *Scott v. Henrich*, 39 F.3d at 915 (reasonable to shoot armed man who confronted police at door); *Menuel v. City of Atlanta*, 25 F.3d 990, 996 (11th Cir. 1994) (fatal shooting of emotionally disturbed suspect was reasonable); *Placas v. Drinski*, 19 F.3d 1143, 1148-49 (7th Cir.), *cert. denied*, 513 U.S. 820 (1994) (shooting of suspect was reasonable; officers not required to use available alternatives of maintaining distance from suspect with protection of barrier, or using chemical spray).

By stressing the wide latitude and the viewpoint of the objectively reasonable officer on the scene, the standard on the merits provides the same protection as qualified immunity for the innocently mistaken officer who must make split-second judgments in the field and permits a wide choice of force alternatives to accomplish the needed task of apprehending an individual.

It is helpful to apply *Graham* and the combination of cases discussed above to the facts of the case at hand. There is a video in this case that shows Dr. Katz being given an unnecessary, violent, shove into the back of a military vehicle. Saucier claims that the shove was necessary because Dr. Katz was resisting being placed into the vehicle. Dr. Katz disputes the claim that he was resisting and said that he did not resist.[11] This disputed fact

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[11] Petitioner admitted in his Reply Brief for the Petitioner on Petition for a Writ of Certiorari that "respondent points out that he denied resisting arrest or pushing off the bumper with his feet. See *ibid.* We do not (for present purposes) contend otherwise" pg. 3, fn. 1. Perhaps realizing that this unquestionably raises a question of fact that must be resolved by the jury regardless of what standard is applied, Petitioner later tries to claim in the opening brief that it is enough that Dr. Katz placed his foot on the bumper for Saucier to have reasonably believed that he was going to resist (even if he wasn't) thereby making the violent shove reasonable as a matter of law. Immunity based upon such a tenuous connection would make a mockery of the Fourth Amendment. Fortunately the video shows that Dr. Katz was not resisting. And common sense supports such a conclusion. A 60-year-old man with a fractured foot wearing a splint instead of a shoe is unlikely to be resisting by pushing off a back bumper with his feet – but this is for a jury to decide. Any jury will see the shove for what it was – a gratuitous act to give him one for good measure – the type of act that the Fourth Amendment protects against.

insures that regardless of the legal standard that this Court applies, this case will return to the trial court for a decision by the jury about whether Dr. Katz was resisting. And if they find that he was resisting and pushing off the vehicle, despite his testimony and the video showing that did not happen, then they will find that the officers did act in an objectively reasonable manner – as they should under the *Graham* factor that considers whether the suspect "is actively resisting arrest or attempting to evade arrest by flight." *Graham*, U.S. 490 at 396. If, however, the jury finds that Dr. Katz did not resist, then they will find that reasonable officers would not have given the violent shove.

Although they do not exist in this case, there are many scenarios in which this Court's guidance in *Graham* will lead to summary judgment. Let us change the facts for illustration. For instance, assuming that the video showed that Dr. Katz was actively resisting and pushing off the bumper with his feet, the trial court could enter summary judgment for the officers based upon a finding that reasonable officers could believe they could use force to overcome the resistence and enable them to put him into the vehicle. This may also be the case if there were no video, but there were a dozen declarations from impartial citizens who saw the incident all saying that Dr. Katz was resisting being placed in the vehicle. Of course there is not even one such declaration in this case because it did not happen. Nonetheless, it does illustrate how a change in the facts would allow a trial court to end the case quickly at summary judgment.

B. Development of Objective Reasonableness Standard for Qualified Immunity

Prior to the decision in *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982), decisions on qualified immunity applied a subjective good faith standard. *Harlow* adopted a solely objective legal reasonableness standard to evaluate qualified immunity. *Harlow*, supra, 510 U.S. at 818. *Harlow* found that "[r]eliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should . . . permit resolution of many insubstantial claims on summary judgment." *Id.* "On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred." *Id.* "If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct" *Id.* at 818-819. Only if the official can establish "extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, [can] the defense be maintained." *Id.* at 819.

Harlow was careful to underscore that this test should not be read in such a way that it would provide a "license for lawless conduct." *Id.* And that "the public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official's acts." *Id.* "Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate." *Id.*

The Court reemphasized the objectiveness of the qualified immunity inquiry in *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) ("qualified immunity . . . turns on the 'objective legal reasonableness' of the action."). *Anderson*, a case involving whether the law enforcement officers had probable cause, refined the standard, allowing for occasions where an abstract right such as due process is well established, but where the abstract right is not sufficient to allow "officials to reasonably . . . anticipate when their conduct may give rise to liability for damages." Applying this "abstract right" exception or refinement of *Harlow* to the question of a warrantless search conducted based on probable cause and exigent circumstances, the Court found that because of the complex legal issues involved in probable cause, "We have recognized that it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present." *Id.* at 641.

C. The Standard For Determining Liability and The Standard For Determining Qualified Immunity Converge In A Fourth Amendment Claim For Excessive Use of Force.

In *Graham*, which was decided after *Anderson*, the Court expressly left open the question of the application of qualified immunity to an excessive force case given the careful articulation of the legal standard in *Graham*, 490 U.S. at 390 n. 12. Nonetheless, the same broad protection and wide latitude provided for the law enforcement officer by *Graham*, on the merits, as by *Anderson*, on qualified immunity, as well as the emphasis under both standards

of the "objective reasonableness" of the force used, compels the conclusion that the standards, if not precisely the same in theory, are the same in application.

While there is disagreement among the circuits on this question, the Ninth Circuit and the majority of the other circuits have held that these standards have merged or become the same in application in all but extraordinary cases. *See LaLonde v. County of Riverside*, 204 F.3d 947, 959 (9th Cir. 2000) (test for qualified immunity in excessive force cases is the same as the test on the merits); *Scott v. Henrich*, 39 F.3d 912, 914 (9th Cir. 1994), *cert. denied*, 515 U.S. 1159, 132 L. Ed. 2d 855, 115 S. Ct. 2612 (1995); *Napier v. Town of Windham*, 187 F.3d 177, 183 (1st Cir. 1999) (qualified immunity and excessive force standard are similar inquiries); *Roy v. Lewiston*, 42 F.3d 691, 695 (1st Cir. 1994) ("In theory, substantive liability and qualified immunity are two separate questions . . . In police misconduct cases, however, the Supreme Court has used the same 'objectively reasonable' standard in describing both the constitutional test for liability [citing *Graham*] and the Court's own standard for qualified immunity [citing *Anderson*]."); *Finnegan v. Fountain*, 915 F.2d 817, 824 n.11 (2d Cir. 1990); *Rowland v. Perry*, 41 F.3d 167, 173 (4th Cir. 1994) ("The immunity test and the test on the merits both rely on an objective appraisal of the reasonableness of the force employed."); *Jackson v. Hoylman*, 933 F.2d 401, 402 (6th Cir. 1991) ("qualified immunity turns on the same objective reasonableness standard that the claim of excessive force turns on."); *McNair v. Coffey*, 234 F.3d 332 (7th Cir. 2000) (once jury has determined under the Fourth Amendment that the officer's conduct was objectively unreasonable, that conclusion necessarily resolves for

immunity purposes whether a reasonable officer could have believed that his conduct was lawful"); *Frazell v. Flanagan*, 102 F.3d 877 (7th Cir. 1966); *Guffey v. Wyatt*, 18 F.3d 869, 873 (10th Cir. 1994) ("If a plaintiff alleges a police officer has used excessive force in violation of the Fourth Amendment, the qualified immunity inquiry becomes indistinguishable from the merits of the underlying action."); *Street v. Parham*, 929 F.2d 537 (10th Cir. 1991) ("when jury . . . decided that the force used by the officer was unreasonable under all the circumstances . . . no officer could reasonably believe that the use of unreasonable force did not violate clearly established law."); *Scott v. District of Columbia*, 101 F.3d 748, 759 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1231 (1997) ("the issue of whether an officer used excessive force and whether he is entitled to qualified immunity are both determined according to a single standard").[12]

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[12] Contrary to Petitioner's argument, few cases have found that the force used was unreasonable under *Graham* and the Fourth Amendment, but not "reasonably known to be unreasonable" under *Anderson* and qualified immunity. Contrary to the suggestion by Petitioner, the cases collected in footnote 12 of Petitioner's brief are not examples of a court making such a finding "reasonably unreasonable" force. For example, in *Napier v. Town of Windham*, 187 F.3d 177, 182-83 (1st Cir. 1999), the court held that "[u]nfortunately for clarity's sake, the 'objective reasonableness' of the officer's conduct is crucial to both the qualified immunity and the substantive liability inquiries." *Id.* at 182. The court went on to say that as a result of the similar inquiries, the determination that the police officer's conduct was objectively unreasonable could have been a grant of summary judgment on either qualified immunity or substantive Fourth Amendment grounds. *Id.* at 183. In *Finnegan v. Fountain*, 915 F.2d 817, 824 (2d Cir. 1990), not only did the

The convergence of these standards is not the result of an accidental use of the same terminology, it is because *Graham*'s standard on the merits provides the same broad protection for error afforded a law enforcement officer under the doctrine of qualified immunity, and because under both standards the same facts are viewed from the same perspective (the objectively reasonable officer) and assessed with an equivalent measure of what level of force is legally excessive ("reasonable" and "reasonably known to be reasonable").

As discussed above, *Graham* not only clarified the previously uncertain standard for assessing a claim of excessive force, it set forth in detail the particular protections and the wide latitude that must be extended to the law enforcement officer. *Graham*, 490 U.S. at 396. The force must be assessed from the officer's perspective. It must be assessed at the moment the decision to use the force is made. It must take into consideration the severity

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court not present an example of "reasonably unreasonable" force, but it noted the unlikelihood of such a possibility. *Id.*, at 824 n.11. Likewise, in *Rowland v. Perry*, 41 F.3d 167, 173 (4th Cir. 1994) the court not only did not make a finding of "reasonably unreasonable" force, but emphasized that qualified immunity and the merits "both involve the objective appraisal of the reasonableness of the force employed." *Id.* Neither of the cases cited from the Seventh Circuit made a finding of "reasonably unreasonable" conduct. Moreover, Judge Easterbrook has most recently eloquently expressed why no qualified immunity defense is applicable to a claim of excessive force. *McNair v. Coffey*, 234 F.3d 352 (7th Cir. 2000). The Eighth Circuit decision in *Landrum v. Moats*, 576 F.2d 1320, *cert. denied*, 439 U.S. 912 (1978) was decided before *Graham* and necessarily cannot involve a finding of "reasonably unreasonable" force.

of the crime, whether the plaintiff is resisting arrest or attempting to flee. It must be mindful that every push and shove is not a violation of the Fourth Amendment, even if it is later viewed as unnecessary. *Id.* Through these protections, and the detailed articulation of the standard, *Graham* accomplishes the goal of the qualified immunity doctrine.

Not only does *Graham* already provide wide latitude and a substantial margin for error on the part of the officers, the standards are in concept and application the same. In both assessing the merits of an excessive force claim and in assessing qualified immunity, the trier of fact must examine the facts from the perspective of the hypothetical "objectively reasonable officer," at the time of, and under the pressures of the moment just before the force is used. *Graham v. Connor,* 490 U.S at 396 (reasonableness "judged from perspective of a reasonable officer on the scene, . . . at that moment"); *Anderson v. Creighton,* at 639 ("whether an official [is] protected by qualified immunity . . . generally turns on the objective legal reasonableness of the action").

For both inquiries, courts have emphasized the "objective" nature of the standard. What this particular officer felt, knew, or believed is not relevant. The trier of fact must examine the use of force through the lens of the legal fictional character, the "objectively reasonable officer." The result is that in practice the objectively reasonable officer is the same for both Fourth Amendment and qualified immunity. To the extent there is a minuscule difference, one of semantics, it is necessarily confusing to

both judges and juries and is an inappropriate distinction for two sets of jury instructions.[13]

Petitioner incorrectly relies upon *Anderson* for the claim that *Graham*'s objective reasonableness standard is so different from the qualified immunity standard that the trial court may second guess the jury after its verdict. *Anderson* did conclude that in probable cause cases the objective reasonableness standard is different between

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[13] Instead of the confusing instructions that would result from the incomprehensible distinctions proposed by Petitioner, Respondents suggest that the following jury instructions could be included as more particularly instructing on the standard set forth by *Graham*.

1. The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, at the moment of the decision to use the force, rather than with the 20/20 vision of hindsight. In reaching your decision, you shall allow for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation.

Graham v. Connor, 490 U.S. at 396.

2. In considering whether a law enforcement officer used excessive force, you shall consider the severity of the crime and whether the defendant actively resisted arrest or attempted to evade arrest by flight. The officer is not obligated to use the minimum amount of force necessary. Not every push or shove even if it may later seem unnecessary in the peace of the courtroom violates the Fourth Amendment.

Graham v. Connor, 490 U.S. at 396.

3. In considering whether a law enforcement officer used excessive force, you shall give ample room for mistaken judgments.

Graham v. Connor, 490 U.S. at 396.

the Fourth Amendment and qualified immunity. Excessive force, however is different for two reasons. First, *Graham*, which came after *Anderson*, took care in defining use of force in objectively reasonable terms. Second, the *Graham* standard is well settled compared with probable cause, which is often in a state of flux.

The particular area addressed in *Anderson* was a warrantless search based on probable cause and exigent circumstances. *Id.* at 637. Because this right arises out of the Fourth Amendment, as does a claim against excessive force, Petitioner attempts to argue that *Anderson* is applicable to the instant case. This fails to recognize the substantial differences between the issue of probable cause and excessive force. "Even learned and experienced jurists have had difficulty in defining the rules that govern probable cause." *Bivens v. Six Unknown Agents*, 456 F.2d 1339, 1348 (2d Cir. 1972) (on remand from Supreme Court). This is because the determination of probable cause involves the legal standards for the underlying crime, which is often evolving. The Amicus Brief by the ACLU provides an excellent example of the developing and uncertain nature of law underlying a determination of probable cause, in its discussion of the jurisprudence concerning investigatory stops or arrests based on information provided by informants. Such legal uncertainty explains and underscores the need for the qualified immunity doctrine in the area of probable cause. No such developing legal doctrine exists in the area of the amount of force necessary to make an arrest. *Graham* not only

established the general standard for such a determination, but provided ample detail for its application in particular situations.

These differences between probable cause and excessive force cases have been recognized by the lower federal courts. *See e.g. Humphrey v. Staszak,* 148 F.3d 719 (7th Cir. 1998); *Alexander v. County of Los Angeles,* 64 F.3d 1315, 1322 (9th Cir. 1995); *Street v. Parham,* 929 F.2d 537, 541 n.2 (10th Cir. 1991) (because of the difficulties of deciding the probable cause issue, the conduct of the officer may be objectively reasonable even if cause did not exist, but in "excessive force cases, once a fact-finder has determined that the force used was unnecessary. . . . Any question of objective reasonableness [is] . . . foreclosed."); *Landy v. Irizarry,* 884 F. Supp. 788, 801 n.18 (S.D.N.Y. 1994).

One court described this distinction as one of *ex post* inquiry and *ex ante* inquiry. *Finnegan v. Fountain,* 915 F.2d 817, 824 n.11 (2d Cir. 1990). In *Finnegan,* the second circuit held that the determination of qualified immunity and reasonable use of force to both be *ex ante* inquiries, made from the perspective of the officer at the moment the decision to use force is made. In contrast, the probable cause inquiry is a *ex post* inquiry judging reasonableness from the actual circumstances as determined as a matter of fact. These cases show that the differences between probable cause and excessive force justify *Anderson,* but no expansion of it. Besides, to the extent that any expansion of *Anderson* into excessive force is necessary, *Graham* more than covers it.

It is apparent that Judge Easterbrook was aware that *certiorari* had been granted in this case when he authored

the court's opinion in *McNair v. Coffey*, 234 F.3d 352, 355 (7th Cir. 2000).[14] It should not be forgotten that qualified immunity is made out of judicial cloth. Every stitch to create it is a stitch unraveled from the Fourth Amendment. The history that "until this century police faced absolute liability (in trespass and battery) for their acts; probable cause and reasonableness were defenses, and immunity (on top of these defenses) was unheard of," *Id.* at 356, is significant. Unnecessary expansion of immunity should be avoided by this Court.

As the court further states in *McNair*, "[a]ll the great early opinions defining the scope of freedom from official intrusion resolve damages claims, without a hint that if the official behaved unreasonably they might still be immune from liability." For these reasons, he concludes that "a general doctrine of official immunity, independent of legal uncertainty, is not only anti-textual but also anti-historical in fourth amendment cases."[15] *Id.* More good

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[14] The court in *McNair* specifically cited and followed this case now before the Court while commenting that its resolution may soon provide guidance to the circuits. *McNair*, 234 F.3d at 355. ("The Supreme Court may resolve this conflict in *Saucier*; unless superseded by higher authority, however, the position articulated in *Frazell*" [agreeing with the Ninth Circuit position] prevails in this circuit.)

[15] Here there is specific language in the text of the Constitution that applies. The Seventh Amendment states, "No fact tried by a jury shall be otherwise re-examined in any Court of the United States. . . . " U.S. CONST. AMEND. VII. This prohibition against second guessing is at the core of the Seventh Amendment. A *textual* interpretation of the Seventh Amendment clearly prohibits second guessing – even for purposes of qualified immunity. The meaning of the text should

reasons to let *Graham* continue doing the job it does so well.

II. THE SEVENTH AMENDMENT PRECLUDES THE JUDGE FROM ENTERING A DIRECTED VERDICT BASED ON QUALIFIED IMMUNITY AFTER THE JURY HAS FOUND A VIOLATION OF THE FOURTH AMENDMENT IN AN EXCESSIVE FORCE CASE

A. The History of the Seventh Amendment Shows that it is a Fundamental Right That Has Been "Jealously Guarded" by this Court

For the reasons previously set forth, *Graham* works perfectly well and the Court may decide, in accordance with the majority of circuits, that the Fourth Amendment and qualified immunity analysis is either identical or merge at the time of trial. Should this Court, however, consider the possibility of deciding that the reasonableness inquiry for a Fourth Amendment excessive force

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guide this Court. As Justice Scalia has written in *A Matter of Interpretation, Federal Courts and the Law* 38 (1997) "[w]hat I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended." The original meaning, no second guessing by the court, is clear from the text. This case lies right at the crux of the social contract, of which the Seventh Amendment is a part, between federal government officials and those they govern. It is here that a written Bill of Rights shows its brilliance as the touchstone of the rule of law. In the case at hand, when the federal government seeks to have federal judges provide greater insulation for federal officials, it is the text of the Amendment itself, and this Court's steadfast dedication to it, that requires the government's entreaty to be denied.

case and for qualified immunity are not identical, do not merge, and that qualified immunity raises the bar of protection for police officers above a finding that the Fourth Amendment has been violated, then the Court should consider the limits the Seventh Amendment places on such a decision.

Petitioner refuses to address the ramifications of the legal standards that they ask this Court to adopt. Counsel for the Respondents made it clear in their response to Petitioner's Writ for Certiorari that grave Seventh Amendment issues arise from Petitioner's argument. Response to Petitioner's Writ of Certiorari, pg. 4 ("Any outcome that allows the judge to second guess the jury after it has applied the *Graham* standard is the height of judicial activism and violates the Seventh Amendment"). Nonetheless, Petitioner's brief does not include a single word discussing the Seventh Amendment.

Fortunately, this Court does not turn a deaf ear to the mandate of the Seventh Amendment. As Chief Justice Rehnquist wrote in his dissenting opinion in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 352 (1978), "[t]he right of jury trial in civil cases at common-law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts." (Quoting *Jacob v. New York*, 315 U.S. 752, 753 (1942)). Jealously guarding the Seventh Amendment right to jury has long been the practice of this Court. *Balis v. Travelers' Ins. Co.*,

113 U.S. 316, 321 (1885) ("This constitutional right [Seventh Amendment] this court has always guarded with jealousy").

There is good reason to squarely address the Seventh Amendment issue in this case. The unarticulated erosion of the Seventh Amendment proposed by the government's legal standard is exactly the type of gradual erosion that Justice Black warned about over 58 years ago when he lamented the "gradual process of judicial erosion which in one-hundred-fifty years has slowly worn away a major portion of the essential guarantee of the Seventh Amendment." *Galloway v. United States*, 319 U.S. 372, 397 (1943) (dissenting opinion). If the reasonableness standard for qualified immunity provides for greater insulation from liability than the reasonableness standard in *Graham* for the Fourth Amendment, and the decision of qualified immunity is made by the judge, then the judge is second-guessing the jury in violation of the Seventh Amendment.

A historical review of the original intent of the Seventh Amendment shows clearly that this type of second-guessing by judges was exactly what the Amendment was intended to prohibit.[16] As Justice Rehnquist explains

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[16] Professor Jack N. Rakove, in his book *Original Meanings: Politics and Ideas in the Making of the Constitution*, Chapter X, "Rights," pages 297-302 provides an insightful history of sentiment regarding the right to jury trial at the time of the preparation of the Constitution and Bill of Rights. As he sums up before the discussion, "[a]t the outset Americans believed that arbitrary acts of the Crown and its colonial officials, including judges of the higher courts, posed the greatest threat, and they accordingly treated the rights of representation and

in *Parklane*, the historic roots of the Seventh Amendment run deep. "It is perhaps easy to forget, now more than 200 years removed from the events, that the right of trial by jury was held in such esteem by the colonists that its deprivation of the hands of the English was one of the important grievances leading to the break with England."[17] He goes on further to point out that the denial of "the right of jury trial was listed among the specific offensive English acts denounced in the Declaration of Independence."[18]

Justice Rehnquist further explains how the popular demand for a right to jury trial in both criminal and civil cases did not end with the Declaration of Independence, but continued on after the constitutional convention.[19] As he sums up, " . . . the price exacted in many states for

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trial by jury as their chief securities against arbitrary rule." *Id.* at 289-290.

[17] Citing S. Morison, *Sources and Documents Illustrating the American Revolution 1764-1788 and the Formation of the Federal Constitution* 94 (2d ed.-1929); R. Pound, *The Development of Constitutional Guarantees of Liberty* 69-72 (1957); *The Vice-Admiralty Courts and the American Revolution* 208-211 (1960).

[18] *Parklane, supra,* 340. Citing the language in the Declaration which states: "for depriving us in many cases, of the benefits of Trial by Jury." He further cites the First Continental Congress which unanimously decided that the colonies were entitled to "the great and inestimable privilege of being tried by their peers." 1 *Journals of the Continental Congress* 69 (1904). This idea that one could turn to their peers to check the excesses of government officials is a thread that runs throughout the demand for the creation of the Seventh Amendment and is central to this case.

[19] *Parklane*, 439 U.S. at 342.

approval of the Constitution was the attending heavy list of recommended amendments, chief among them a clause securing the right to jury trial in civil cases."[20]

The circuit courts have shared this appreciation and reverence for trial by jury. As the court pointed out in *Melear v. Spears*, 862 F.2d 1177, 1178 (5th Cir. 1989) "Montesquieu once predicted the demise of the English system of liberty by comparing England and once-powerful ancient cultures. In the commentaries, Blackstone chose an apparently mundane basis for rebuttal, contending that Montesquieu 'should have recollected that Rome, Sparta and Carthage, were strangers to trial by jury.' *Id.* We likewise revere the jury's function, just as we revere the right to the jury trial that Aviett exercised."

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[20] *Id.* This historical analysis is supported by Supreme Court precedent closer to the time of the formation of the Bill of Rights. For instance, in *Parsons v. Bedford et al.*, 28 U.S. 433, 446, (1830) the Court summarized: "one of the strongest objections originally taken against the Constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases. As soon as the Constitution was adopted, this right was secured by the Seventh Amendment of the Constitution proposed by the Congress; and which received an assent of the people so general, as to establish its importance as a fundamental guarantee of the rights and liberties of the people."

B. Lower courts have correctly recognized that the Seventh Amendment prohibits a judge from directing a verdict based upon qualified immunity after the jury has found a Fourth Amendment violation.

In *LaLonde v. County of Riverside*, 204 F.3d 947 (9th Cir. 2000), the court held that the trial court cannot make determinations of fact because to do so would violate the Seventh Amendment. *Id.* at 954 ("[W]here there is a genuine issue of fact on a substantive issue of qualified immunity, ordinarily the controlling principles of summary judgment and, if there is a jury demand and a material issue of fact, the Seventh Amendment, require submission to a jury." *Id. citing Thompson v. Mahre*, 110 F.3d 716, 719 (9th Cir. 1997)).

In *Brisk v. City of Miami Beach*, 726 F. Supp. 1305 (S.D. Fla. 1989), the court provided a thoughtful analysis of the Seventh Amendment limitiations upon a court using qualified immunity to grant a directed verdict after there has been a jury verdict. The court concluded that such an act would violate the Seventh Amendment stating:

> Similarly, if the Court were to have determined that excessive force was in fact applied, but that an officer in the position of a later-arriving defendant could have believed that the amount of force used was necessary under the circumstances, then the Court would have granted a motion for directed verdict based on qualified immunity. Granting a directed verdict under these circumstances would have deprived Plaintiff of his right to have a jury decide exactly what occurred during the incident in question.

(citing *Melear v. Spears*, 862 F.2d 1177, 1188 (5th Cir. 1989)). *Id.* at 1313.

This type of second guessing by the trial judge after a jury verdict is exactly what the defendants are trying to get this Court to approve – although they never come out and say it. Despite all of the discussion below and direct references in the Response to Request for Certiorari about how the government's proposed standard is supposed to work, they never provide an explanation to this Court. It is understandable why the government avoids this issue – their proposed standard is absolutely unworkable without violating the Seventh Amendment. Though the government does not admit it, here is what is happening: the practical result of their proposed new standard is to lower the threshold for directed verdict and allow the trial judge to second guess the jury without meeting the requirements of a Rule 50 directed verdict. Basically their proposal is that the trial judge can say to the jury "thank you ladies and gentlemen for taking time from your busy lives and fulfilling the important role that our founders preserved for you in the Seventh Amendment. You can go home now and I'll consider the same evidence and decide again."

Although the government does not discuss directed verdict in its brief, their argumentative heading makes it clear that their position requires the judge to make a determination after the jury. It reads:

AN OFFICER WHO USES FORCE THAT IS ULTIMATELY FOUND UNREASONABLE UNDER THE FOURTH AMENDMENT MAY NEVERTHELESS BE ENTITLED TO QUALIFIED IMMUNITY

What is clear from this heading is that, according to the government, qualified immunity is available **after** the jury has reached its verdict. Since this Court has stated that qualified immunity is to be decided by the judge, *Hunter v. Bryant*, 502 U.S. 224, 228 (1991), the result is a post trial directed verdict motion after the jury has decided.

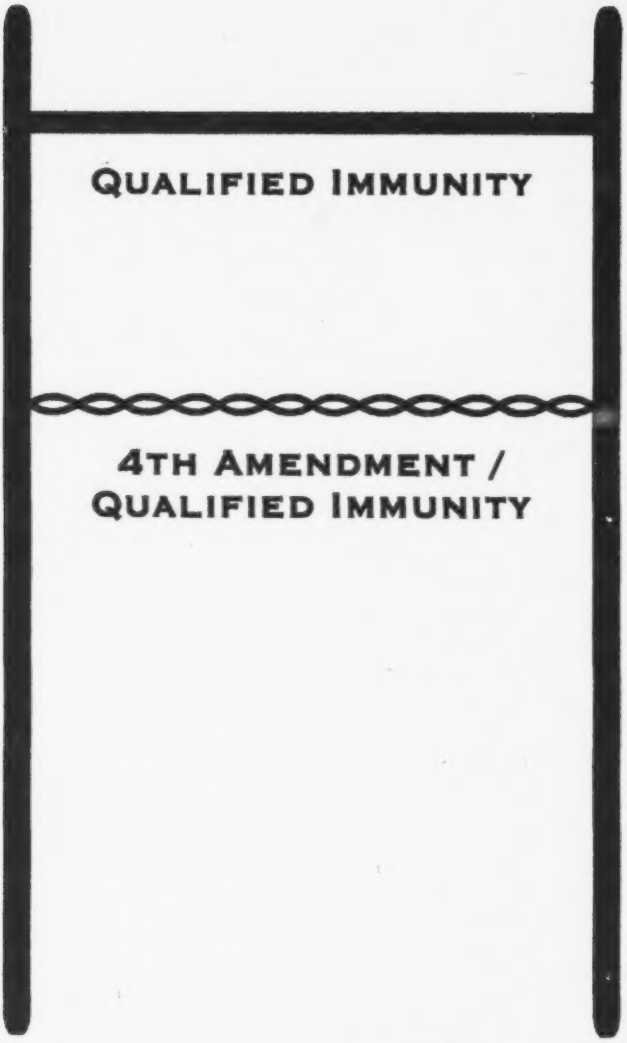
The court in *Brisk* specifically addressed the shortcomings of this argument.

> Moreover, it would be anomalous to have a court deny summary judgment because of disputed factual issues and then grant a directed verdict at trial when these same factual issues remain in dispute and when there is sufficient evidence in the record to allow a jury to find for either party as to those issues. A court adhering to this procedure would in effect be saying that, though the Federal Rules of Civil Procedure at Rule 56 precludes the weighing of evidence at the summary judgment stage, the Federal Rules of Civil Procedure, Rule 50 does not preclude the weighing of evidence when ruling on a directed verdict motion at trial. This view is clearly an incorrect application of both the Federal Rules of Civil Procedure and the standard for reviewing directed verdict motions. A directed verdict is appropriate when there can be but one reasonable conclusion as to the verdict . . . (*Anderson* does not create exception to deferential standard of review applicable to j.n.o.v. motions). It is therefore not this Court's role to deviate from the usual standard of review applicable to directed verdict motions. When disputed facts material to the qualified immunity issue exist and reasonable jurors

> could reach differing conclusions regarding those facts, it is inappropriate for the district court to grant a directed verdict based on qualified immunity. *Brisk*, 726 F. Supp. at 1313.

See, *Halperin v. Kissinger*, 807 F.2d 180, 189 (D.C. Cir. 1986) (J. Scalia, sitting by designation).

While the following diagram is somewhat simplistic, it accurately depicts the impact on the Seventh Amendment of inappropriately allowing the judge to second guess the jury through a lowered standard for directed verdict.



The lower bar can represent either a goal post or a high jump depending on one's sporting preference – the important point is that the plaintiff must clear it. As can be seen, the lower bar is thicker and is intertwined with the two reasonableness decisions of *Graham* and qualified immunity. As discussed earlier in this brief, based upon the Ninth Circuit analysis, and the majority of other circuits, once a plaintiff clears this, then the decision has

been made by the jury and there is no second guessing by the court. The second, higher, bar represents the proposed threshold the government suggests must be cleared in order to overcome qualified immunity when there has been a finding of an unreasonable use of force. Since the only way to clear the higher bar is to convince the judge, the space between the higher bar and the lower bar represents the realm of directed verdict based on qualified immunity in violation of the Seventh Amendment.

The case of *McNair v. Coffey*, No. 00-1139, 2000 WL 1801253 (7th Cir. Dec. 8, 2000) is an example of what happens when the second, higher, bar is added. In *McNair*, the defendant moved for directed verdict and asked the trial judge to second guess the jury's decision and grant a directed verdict based upon qualified immunity. The trial court entered the directed verdict. Reversing, the court in *McNair* commented on the role of the trial judge. "He [the defendant] did not move for judgment under Fed. R. Civ. P. 50 either at the close of the evidence or after the verdict. Instead he accepted the jury's conclusion that the conduct violated the Fourth Amendment and argued that, even so, he is entitled to qualified immunity from civil liability. With this contention the district court agreed, setting aside the verdict and entering judgment for Coffey." The court of appeals then reversed the trial court. While the Seventh Amendment is not directly referred to, it is clear from the court's opinion that part of the error was the trial court's second guessing of the jury.

The government's indirect move to dramatically increase the role of the trial court and displace the jury in contravention of the Seventh Amendment is contrary to

the open eye and ready ear this Court has kept to prevent the erosion of the Seventh Amendment. Having thought a moment about the mechanics of boosting the qualified immunity defense and the ramifications of such a step, this Court should also ask, why boost the defense anyway? Is it needed? The answer is definitely "NO." As previously discussed, ***Graham* works perfectly well** – it was and remains an excellent decision that provides officers with ample protection.

One of the main reasons *Graham* works so well is that it took a mish-mash of conflicting cases, some of which applied an objective test for excessive force and some of which applied a subjective test and set down a simple, workable, standard: "would the objectively reasonable officer have used the amount of force applied"? *Graham* at 397. Part of the beauty of such clean judicial reasoning is that it allows for understandable jury instructions. Trial courts throughout America that are finding that the two reasonableness inquiries are identical or merge are doing so not only because it is sound judicial reasoning and respectful of the Seventh Amendment, but also simply because *Graham* instructions work so well.

The simple fact is that due to Seventh Amendment constraints, the only way to heighten insulation for officers above *Graham* is through jury instructions. If this Court wants to raise the bar in the diagram above *Graham*, which is totally unnecessary and would only create confusion in an important area of law that will be completely settled once this immunity issue is resolved, then the Court has two choices: One, revisit *Graham*, start over, and create another standard higher than objective reasonableness. Two, give the question of qualified

immunity to jurors so that they receive a set of two hopelessly confusing jury instructions.

It is at this juncture that the government's argument loses touch with reality. As with other practical ramifications, the government never talks about the instructions that would result if this Court were to adopt its higher bar and give an additional instruction to the jury. While the government's counsel is certainly highly skilled and their brief is well written, no thought seems to have been given to what it is like to instruct the jury to first decide whether the officer has acted in an "objectively reasonable" manner and then, assuming that the jury finds that the officer acted unreasonably, to decide whether the officer "reasonably acted unreasonably," so they are entitled to qualified immunity.[21]

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[21] Another example of a somewhat disingenuous characterization is the claim that "the Ninth Circuit has effectively held that, in cases like this, officers are prohibited from using *any force at all* to make an arrest." (emphasis original, Brief for the Petitioner, page 43). Of course, the Ninth Circuit never held any such thing, nor has Respondent made that argument. Officers can use force under the Fourth Amendment. The question is whether that use of force was objectively reasonable. The same is true of Petitioner's argument that there must be a serious physical injury for there to be violation of the Fourth Amendment. Fourth Amendment rights do not turn on whether the officer hits someone in the stomach which may not cause a lasting injury instead of hitting them in the face which may. The Fourth Amendment is intended to protect against oppression. *Soldal v. Cook County*, 506 U.S. 56, 113 S.Ct. 538 (1992). Oppression does not always leave a lasting physical injury. Besides, this Court has held that physical injury is not necessary to prove the violation of a constitutional right. *Carey v. Piphus*, 435 U.S. 247, 266 (1978) (law is well settled that a

It helps to have been before the trial judge when these instructions were discussed (as have respondents' counsel representing both officers and plaintiffs including a recent trial where this very issue was discussed at length), to realize how ludicrous they are. It really is demeaning to the entire judicial system to ask jurors to dance on the head of a pin like this. They think, and rightfully so, that the whole system is unreasonable. This Court has many roles, and preserving the integrity of the courts is one of them. If the Court concludes that it really does want to expand police protections beyond what *Graham* provides, then it should do so directly with a new Fourth Amendment standard rather than a back door boost of the bar with qualified immunity which either violates the Seventh Amendment because the judge makes the decision or hopelessly confuses the jurors because they consider two separate obtuse jury instructions.

The case at hand makes for an excellent example. Regardless of how this Court decides, this case will return to the district court for trial.[22] Mr. Saucier testified that Dr. Katz resisted being put into the van by pushing

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plaintiff may recover nominal damages without proof of actual injury for unreasonable intrusions on one's bodily integrity).

[22] Petitioner essentially admits this in his brief at page 41 when he states "if there were a fact dispute concerning whether or not an officer gratuitously struck a complaint suspect with a truncheon, qualified immunity would be inappropriate, and obviously so; any belief that the Fourth Amendment permits such undue violence would be patently unreasonable." Similarly, if Dr. Katz was not resisting, the undue violent shove he was subjected to "would be patently unreasonable."

off the rear bumper to prevent being put inside. Dr. Katz testified that he had a fractured foot, that his foot was in a splint without a shoe, and that he did not resist being put in the van by pushing off the rear bumper. The video tape of the incident confirms Dr. Katz's testimony in that there is coverage at the exact moment he is violently shoved into the van and it does not show any resistence on his part. So there is a question of fact: was Dr. Katz resisting, thereby justifying the violent shove? Of course this is the type of decision that our system leaves squarely in the hands of the jury.

Petitioners may later suggest that jurors make specific findings and then the trial court can take these findings and decide qualified immunity. This proposal is unworkable. What findings would be given to the jury? That Dr. Katz pushed off the bumper, if so how hard did he push off? How long did he push off? Jurors would be left flabbergasted and feeling like they are playing second fiddle – even worse, the judge would invariably fill in the facts that the Seventh Amendment requires the jury to make. Such mixed fact finding violates the Seventh Amendment. *Hodges v. Easton*, 106 U.S. 408, 412 (1882) ("The court could not, consistently with the Constitutional right of trial by jury, submit a part of the facts to the jury, and, itself, determine the remainder without a waiver by the defendants of a verdict by the jury.") Many excessive force cases have complicated and hotly contested facts; such an approach would be both unworkable and a disingenuous way to let the judge decide the facts.[23]

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[23] It would be impossible to decide what specific findings should be made by the jury. A few of the questions that may be

Circuit courts have recognized that at times "[t]he legal question of immunity is completely dependent upon which view of the facts is accepted by the jury." *Adams v. Metiva*, 31 F.3d 375, 387 (6th Cir. 1994). In such a case, the "jury becomes the final arbiter of the claim of immunity." *Id.*; *Mahoney v. Kesery*, 976 F.2d 1054, 1058-59 (7th Cir. 1992). This course, using the *Graham* jury instructions discussed earlier, is a better course than the use of special interrogatories.

Assuming that jurors will decide not only whether Dr. Katz pushed off, but also whether the officers used objectively reasonable force, the real question is what instructions will be given to the jury after they have heard the conflicting testimony from Mr. Saucier and Dr. Katz? Using *Graham*, they should be given instructions similar to those proposed earlier in this brief. As Judge Jensen, himself a seasoned trial lawyer, previously concluded and Judge Thompson, writing for the unanimous Ninth Circuit panel agreed, the jury should decide.

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asked are: How dark was it outside? Was the arrestee resisting? Where were people standing? What danger to the officers existed? What was said? Were there weapons? How were the weapons used if there were any? **What is the jury to do? Write essays?** This myriad of factual questions cannot be enumerated in a special verdict form.

CONCLUSION

The right outcome is to let *Graham* do the job it is well designed to do and, above all else, preserve the right to jury that, as Chief Justice Rehnquist and Justice Scalia have taken the time to thoughtfully prove, historically was at the very core of the Bill of Rights and one of the main conditions for support of the ratification of the Constitution. Once theory and practice are coupled in this case, this Court can fulfill its solemn duty as the guardian of the Bill of Rights, and still insure the protection for law enforcement officials to carry out the duties from which we all benefit.

There are times when trying to fix a non-existent problem creates one. Petitioner's effort is one of them. *Graham* works well. The judgment of the court of appeals should be affirmed.

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MAR 12 2001
(12)

Supreme Court, U.S.
FILED
MAR 12 2001
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No. 99-1977

In the Supreme Court of the United States

DONALD SAUCIER, PETITIONER

v.

ELLIOT M. KATZ AND IN DEFENSE OF ANIMALS

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

In *Anderson* v. *Creighton*, 483 U.S. 635 (1987), this Court held that the defense of qualified immunity is available where an officer is alleged to have conducted an unreasonable search or seizure, even where the *general* legal standard governing his conduct is well-established. Immunity, the Court held, may not be denied merely because "the relevant 'legal rule'" was "clearly established" at a high level of generality. *Id.* at 639. Instead, immunity must be granted unless "the right the official is alleged to have violated [was] 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what *he is doing* violates that right," *i.e.*, "the unlawfulness must be apparent" in "light of pre-existing law." *Id.* at 640 (emphasis added). See also *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986) (immunity proper unless it was sufficiently "obvious" in advance "that no reasonably competent officer would have concluded" that the actions were constitutional). Qualified immunity thus protects "all but the plainly incompetent or those who knowingly violate the law." *Hunter* v. *Bryant*, 502 U.S. 224, 229 (1991) (quoting *Malley*, 475 U.S. at 341).

Anderson specifically rejected the claim that, because the substantive guarantee of the Fourth Amendment and the test for qualified immunity are both framed in terms of reasonableness, qualified immunity is superfluous in Fourth Amendment cases. The Court rejected that argument as logically flawed because it relies on the coincidence of the word "reasonable" in both the qualified immunity test of *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), and the substantive command of the Fourth Amendment. *Anderson*, 483 U.S. at 643-644. The Court refused to carve out a Fourth Amendment exception to *Harlow*'s "across the board" application based on that coincidence of language. Although the word "reasonable" appears in both contexts, it serves differ-

ent purposes and has different meanings in each. In the Fourth Amendment, it defines the boundary of lawful conduct; in qualified immunity, it defines the somewhat broader zone of conduct an officer might reasonably have believed to have been lawful in light of pre-existing law. Where a law enforcement officer makes a reasonable although mistaken judgment regarding the lawfulness of a search under the Fourth Amendment, the Court held, he should "no more be held personally liable in damages than should officials making analogous determinations in other areas of law." *Id.* at 643-644. See also 1 Wayne R. LaFave, *Search and Seizure* § 1.10(b) at 328 (3d ed. 1996) ("[T]he *Anderson* majority rejected" the contention "that a violation of the Fourth Amendment, being an 'unreasonable' search or seizure, could never be reasonable under *Harlow*.").

Respondent and his amici do not seriously dispute that understanding of *Anderson*. Nor do they deny that *Anderson*, like *Harlow* before it, "clearly expressed the understanding that the general principle of qualified immunity it established would be applied 'across the board.'" *Anderson*, 483 U.S. at 645. Nonetheless, they contend that this Court should announce an exception for seizures effectuated through allegedly unreasonable force. Their arguments in support of that exception, however, are unpersuasive; were rejected by this Court in *Anderson*; and not only undermine the purposes of qualified immunity, but also dilute the substantive guarantee of the Fourth Amendment itself.

A. The Qualified Immunity Inquiry Is Distinct From Fourth Amendment Reasonableness

Although the decision below attempted to distinguish *Anderson* as a case involving an unclear legal standard, Pet. App. 14a n.4; Gov't Br. 32-38, respondent and his amici abandon that effort. Instead, respondent and his amici suggest that *Graham* v. *Connor*, 490 U.S. 386 (1989), decided a few years after *Anderson*, somehow obviates the need for

qualified immunity in excessive force cases. In *Graham*, this Court clarified that courts should evaluate an officer's use of force to effectuate an arrest under the Fourth Amendment standard of "objective reasonableness" rather than a test derived from the "shocks-the-conscience" due-process standard of *Rochin* v. *California*, 342 U.S. 165 (1952). See *Graham*, 490 U.S. at 393. *Graham* also identified several factors relevant to that reasonableness determination, such as the severity of the crime, potential threats to officer safety, and whether the suspect resists arrest or flees. *Id.* at 396. The Court also emphasized that reasonableness "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Ibid.* The reasonableness inquiry in the excessive force context, as in other Fourth Amendment contexts, thus allows room for reasonable factual errors. The test is applied in light of the circumstances as a reasonable officer could have perceived them, even if that perception turns out to have been mistaken. See *Maryland* v. *Garrison*, 480 U.S. 79, 87 (1987) (Fourth Amendment allows "for honest mistakes"); *Illinois* v. *Rodriguez*, 497 U.S. 177, 185-186 (1990) (similar); 2 LaFave, *supra*, § 3.2(b) at 37.

1. Characterizing the "objective reasonableness" standard of *Graham* as deferential to officer judgments, respondent and his amici argue that the *Graham* standard is indistinguishable from—or functions similarly to—the qualified immunity standard. See, *e.g.*, ACLU Br. 15 ("the standard for determining qualified immunity is the *same* as that for deciding the constitutional question itself"); Resp. Br. 22 ("the standards, if not precisely the same in theory, are the same in application"); *id.* at 25-26 ("minuscule difference" of "semantics"). As an initial matter, it is difficult to view *Graham* as imposing a constitutional standard that is so deferential to officer judgment that it created a sub-silentio exception to *Anderson* and *Harlow*'s mandate for across-the-board application of qualified immunity principles. Far from

expanding deference to officer judgments (which, in respondent's view, would minimize the need for qualified immunity), *Graham reduced* deference by selecting the more exacting "objective reasonableness" standard over the more permissive shocks-the-conscience approach. 490 U.S. at 393.

More fundamentally, respondent and his amici overlook critical differences between the Fourth Amendment and qualified immunity inquiries. Both take the perspective of a reasonable officer on the scene, account for the split-second nature of officer decisions, and provide room for reasonable mistakes of *fact*. But the qualified immunity inquiry incorporates an additional consideration that the Fourth Amendment does not—what a reasonable officer could have understood *the requirements of law* to have been at the time he acted. The Fourth Amendment inquiry focuses on the officer's use of force and asks whether it was objectively reasonable. The qualified immunity inquiry focuses on established law and asks whether it gave the officer sufficiently clear notice that his conduct was unlawful. Thus, the qualified immunity standard, unlike the Fourth Amendment itself, allows for reasonable mistakes of law.

The lesson of *Anderson* is that qualified immunity is appropriate notwithstanding settled general legal standards if those standards and pre-existing law would not necessarily put a competent officer on notice that "what he is doing," under the specific circumstances he confronted, violates the law. 483 U.S. at 640. Where reasonable officers could differ as to the lawfulness of the conduct, immunity is appropriate; immunity may be denied only if the conduct's illegality was sufficiently "obvious" that "no reasonably competent officer would have" thought it lawful. *Malley*, 475 U.S. at 341.[1]

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[1] Although the ACLU objects (Br. 16-17) to *Malley*'s use of the term "obvious," there is little difference between *Malley*'s standard of obviousness, *Anderson*'s insistence that the illegality be "apparent," or the requirement that the mistake of law be one that "no reasonable officer"

Although *Graham* establishes the general framework for assessing reasonableness, it does not establish with clarity whether particular uses of force, under specific circumstances, are constitutionally reasonable; nor does it preclude courts from altering or refining, over time, their view of the legality of particular conduct. As the Second Circuit has explained, "to say that the use of constitutionally excessive force violates a clearly established right * * * begs the open question whether the particular degree of force under the particular circumstances was" so clearly "excessive" that no reasonably competent officer could have thought it lawful. *Finnegan* v. *Fountain*, 915 F.2d 817, 823 (1990). Consequently, a Fourth Amendment violation occurs when, even taking due account of the officer's factual perspective, the conduct transgresses the bounds society is prepared to accept as reasonable. But immunity remains appropriate unless that conduct went sufficiently "beyond" the sometimes "hazy border between excessive and acceptable force that [the official] had to know he was violating the Constitution," *i.e.*, unless existing case law or the "application of the [excessive force] standard would inevitably lead every reasonable officer in [the defendants'] position to conclude the force was unlawful." *Priester* v. *City of Riviera Beach*, 208 F.3d 919, 926-927 (11th Cir. 2000); *Post* v. *City of Fort Lauderdale*, 7 F.3d 1552, 1559 (1993), amended, 14 F.3d 583 (11th Cir. 1994).

2. Respondent's and his amici's reliance on the deference owed to the officer's perspective under *Graham*, moreover, fails to distinguish this case from *Anderson*. Both the probable cause standard at issue in *Anderson* and the excessive force standard at issue here provide a sensible measure of deference to officer judgments. In both contexts, qualified immunity provides a useful additional margin for reasonable

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would have made. In the end, qualified immunity must protect "all but the plainly incompetent or those who knowingly violate the law." *Hunter*, 502 U.S. at 229 (internal quotation marks omitted).

error to protect competent officers from the burden of litigation and potential liability for reasonable legal mistakes.

Like the reasonable force inquiry, the probable cause inquiry at issue in *Anderson* proceeds from the perspective of a reasonable officer on the scene, allows room for reasonable factual errors, and accords a certain amount of deference to officer judgments. The standard of probable cause, no less than the standard for reasonable force, accords officers "fair leeway for enforcing the law in the community's protection," and "allow[s] for some mistakes" in light of the fact that "many situations which confront officers * * * are more or less ambiguous." *Brinegar* v. *United States*, 338 U.S. 160, 176 (1949); 2 LaFave, *supra*, § 3.2(b) at 37. Indeed, it was precisely for those reasons that the *dissenting* opinion in *Anderson* urged the Court to create an exception to qualified immunity for mistaken probable cause determinations. See *Anderson*, 483 U.S. at 661 (Stevens, J.) ("emphasizing that the probable-cause standard itself recognizes the fair leeway that law enforcement officers must have in carrying out their dangerous work" and "leaves room for mistakes"). Rejecting that argument—as well as the contention that the probable-cause standard itself provides sufficient protection from lawsuits and liability—this Court instead required an additional measure of protection through qualified immunity. The probable-cause standard, although well established and deferential, sometimes fails to put officers on notice that their conduct, under the circumstances before them, is unlawful. *Id.* at 640, 644. When that occurs, "[l]aw enforcement officers whose judgments in making these difficult determinations are objectively legally reasonable," even though ultimately mistaken, "should no more be held personally liable in damages than should officials making analogous determinations in other areas of law." *Id.* at 644. The same is true here.

3. In an attempt to escape *Anderson*'s precedential force, respondent offers a series of purported distinctions between

the probable-cause standard at issue in *Anderson* and the standard of "objective reasonableness" at issue here. Probable cause, respondent and his amici assert, is an *ex post* inquiry (conducted from an objective perspective, after the fact), while reasonable force is examined *ex ante* (from the perspective of the officer on the scene). Resp. Br. 28; ACLU Br. 19-20. Probable cause, respondent and his amici further claim, is a complex, technical doctrine that is "often in a state of flux," "developing and uncertain," Resp. Br. 27, or "evolving," ACLU Br. 12-13; N.Y. Bar Br. 11.

The short answer is that, under *Anderson*, those purported distinctions make no difference. *Anderson* is not premised on the notion that probable cause is determined after the fact, or on the theory that the doctrine is peculiarly "technical" or "evolving." In *Anderson* itself, no such concerns were present; the sole question was whether, applying settled standards to the particular circumstances before the officers, probable cause and exigent circumstances were present. Gov't Br. 34-36; 483 U.S. at 640-641; *id.* at 657-658 (Stevens, J., dissenting) ("Anderson has not argued that any relevant rule * * * was not 'clearly established'" but contends that "his own reasonable belief that the conduct engaged in was within the law suffices to establish immunity."). Instead, *Anderson* rests on the observation that, in some cases, neither the probable-cause standard itself nor pre-existing case law will establish the "contours of the right" with such clarity that a reasonable officer must necessarily "understand that *what he is doing*" is unlawful. *Id.* at 640 (emphasis added). Where that occurs, the Court held, an officer is entitled to qualified immunity, whether or not there are any "evolving" abstract legal issues in the background.[2]

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[2] Following *Anderson*, the courts of appeals regularly address qualified immunity in cases where the only question is whether officers reasonably erred in believing that the facts before them were sufficient to

More fundamentally, the purported distinctions are no answer to the command of *Anderson* and *Harlow* that qualified immunity standards apply "across the board." Whatever minor differences may exist between the probable cause and excessive force standards, they pale in comparison to the vast differences among the standards established by other constitutional provisions. Yet *Anderson* and *Harlow* require that immunity be available with respect to purported violations of each. Respondent's emphasis on supposed differences between the two Fourth Amendment standards also ignores the fact that the proposed exception to qualified immunity that *Anderson* rejected was not limited to issues of probable cause. See 483 U.S. at 643. The Fourth Amendment's text requires reasonableness to play a role in every Fourth Amendment case, and *Anderson* rejected the view that the coincidence of the term "reasonable" in the qualified immunity test and in the Fourth Amendment's text provides a basis for declaring qualified immunity unavailable in Fourth Amendment cases. *Ibid.*

In any event, the purported distinctions relied on by respondent and his amici are without basis. With respect to the *ex ante* versus *ex post* distinction, Resp. Br. 28; ACLU Br. 19-20, both probable cause and reasonable force are determined from the *ex ante* perspective, *i.e.*, in light of the facts available to the police at the time the action was taken, as this Court's cases make clear. Compare *Graham*, 490 U.S. at 396 ("perspective of reasonable officer on the scene"), with *Hunter*, 502 U.S. at 228 ("Probable cause existed if '*at the moment the arrest was made* . . . the facts and circumstances * * * of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing' that" a crime had been committed) (emphasis

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establish probable cause. *Lombardi* v. *City of El Cajon*, 117 F.3d 1117 (9th Cir. 1997); *Bagby* v. *Brondhaver*, 98 F.3d 1096 (8th Cir. 1996). Indeed, *Malley* v. *Briggs*, *supra*, was precisely such a case.

added).[3] Nor can one distinguish probable cause on the theory that *Graham* establishes a "nontechnical" doctrine. ACLU Br. 13. Probable cause is likewise "a practical, nontechnical conception." *Brinegar*, 338 U.S. at 176.

Finally, the probable-cause standard cannot be distinguished on the theory that it is in "flux" or "evolving," while reasonable force under *Graham* is not. It strains credulity to assert that the centuries-old probable cause standard is evolving and uncertain while the 12-year-old *Graham* standard has ossified. The cases amici cite for the uncertainty of the probable-cause standard (ACLU Br. 12) concern application of that standard to information from anonymous informants. Far from establishing widespread legal confusion about the probable-cause standard, those cases underscore the point this Court made in *Anderson*—that legitimate uncertainties exist in the application of most well-established legal norms, and police officers should not be held liable if they make reasonable, but ultimately erroneous, determinations about the application of the general standard to specific facts.

Graham, moreover, hardly eliminates all "legal uncertainty," Resp. Br. 27-28; ACLU Br. 21, regarding reasonable force. The reasonable force standard under *Graham* is by necessity highly general. As this Court has emphasized, "the test of reasonableness under the Fourth Amendment is not capable of precise definition," and depends on "a careful bal-

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[3] *Finnegan* v. *Fountain*, 915 F.2d at 824 n.11, upon which respondent and its amici rely for the *ex post/ex ante* distinction, *refused* to equate qualified immunity and substantive Fourth Amendment reasonableness. See *id.* at 823 ("We read Finnegan's argument to state that any use of constitutionally excessive force violates 'clearly established' rights, so that qualified immunity may not shield one who had used excessive force. We do not agree."). Similarly, respondent's claim that the Second and Fourth Circuits equate the two inquiries (Br. 22 & 23 n.12), is incorrect. The case law is to the contrary, Gov't Br. 29 n.12, as even respondent's amicus concedes, ACLU Br. 11 n.4.

ancing of the nature and quality of the intrusion * * * against the countervailing governmental interests." *Graham*, 490 U.S. at 396 (internal quotation marks omitted). To be sure, *Graham* identifies three factors that should be considered in evaluating the use of force. But that list is non-exclusive, and *Graham* offers no indication of the relative weight assigned to each. Courts and juries applying *Graham* thus are left to balance all relevant considerations and decide "whether the totality of the circumstances justified a particular sort of * * * seizure." *Tennessee* v. *Garner*, 471 U.S. 1, 8-9 (1985). That open-ended balancing standard can no more unfailingly put reasonable officers on notice of the legality or illegality of their conduct in every possible circumstance than can the similarly open-ended totality-of-the-circumstances test used for probable cause (let alone the more definitive tests applied outside the Fourth Amendment context, each of which is backstopped by "across the board" application of qualified immunity). Indeed, judges applying *Graham* often can and do disagree on whether particular uses of force are reasonable, Gov't Br. 24-25 & n.8, and so too can reasonable officers.

Even at the abstract level, questions of reasonable force are no less plagued by uncertainty than are questions of probable cause. Courts and judges, for example, disagree over the seriousness of and weight accorded to certain crimes in the *Graham* balance,[4] whether certain types of force qualify as "deadly force,"[5] and on the extent to which

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[4] Contrast *Hammer* v. *Gross*, 932 F.2d 842, 846 (9th Cir.) (drunk driving not serious for purposes of *Graham* because it was a misdemeanor) (en banc plurality), cert. denied, 502 U.S. 980 (1991), with *id.* at 852-853 & n.3 (Kozinski, J., concurring) (drunk driving extremely serious, fatality-producing offense).

[5] Contrast *McQurter* v. *City of Atlanta*, 572 F. Supp. 1401, 1416 (N.D. Ga. 1983) (choke-hold "a technique classified as 'deadly force,' in the same category as 'use of a firearm.'"), with *Gassner* v. *City of Garland*, 864 F.2d

an officer may use force to obtain evidence from a suspect's body.[6] Other open and novel legal issues abound.[7] *Graham* is helpful in addressing those issues. But it does not resolve them with such clarity that only "the plainly incompetent or those who knowingly violate the law," *Hunter*, 502 U.S. at 229, can cross the constitutional boundary separating lawful from unlawful force.[8]

394, 396, 400 (5th Cir. 1989) (use of choke-hold on unarmed suspect reasonable).

[6] Contrast *United States* v. *Holloway*, 906 F. Supp. 1437, 1443 (D. Kan. 1995) (use of pepper spray to obtain contents of defendant's mouth not excessive, as "[o]fficers were not required to simply wait to let nature take its course"), with *State* v. *Hodson*, 907 P.2d 1155, 1158 (Utah 1995) (applying pressure to throat to obtain contents of mouth excessive, as "[n]o emergency or exigency justifies the use of force at this level to preserve evidence which would be readily (if inconveniently) accessible through nonviolent means").

[7] Courts have addressed the propriety of specific types of seizures and restraints, *e.g.*, *Cruz* v. *City of Laramie*, No. 99-8045, 2001 WL 127789, at *3-*4 (10th Cir. Feb. 15, 2001) (holding that officers may not use hog-tie restraint on suspect with diminished capacity, but that the "rule prohibiting such a restraint in this situation was" not "'clearly established' at the time" the officers acted); *Russo* v. *Cincinnati*, 953 F.2d 1036, 1044 (6th Cir. 1992) (no clearly established law regarding use of stun guns and tasers); and mechanisms for obtaining compliance, *Forrester* v. *City of San Diego*, 25 F.3d 804, 807 (9th Cir. 1994) (use of pain-compliance through nonchakus), cert. denied, 513 U.S. 1152 (1995).

[8] The ACLU also argues (Br. 15-16) that the probable-cause and exigent-circumstances inquiries at issue in *Anderson* are distinct from the reasonable-force inquiry because, when it comes to reasonable force, an officer has a "range of reasonable options" available to him. The fact that an officer may choose from a range of reasonable alternatives, however, does not mean that the boundary between "reasonable" and "unreasonable" force, and between reasonable and unreasonable options, is necessarily clear. Indeed, each available option may also cross the boundary of reasonableness if taken too far. The argument also does not distinguish searches from uses of force, or this case from *Anderson*. In both contexts, the ultimate and only question that must be decided is whether the action the officer actually undertook was sufficiently justified as to be rea-

Respondent's and his amici's reliance on *McNair* v. *Coffey*, 234 F.3d 352 (7th Cir. 2000), is mistaken for the same reason. In that case, the court declared that "[u]ncertainty about the legal standard" applicable to excessive force cases "ended" with *Graham*; although "[t]here may still be uncertainty in the application of that standard to particular situations," the court continued, "this is not the kind of legal uncertainty that *Anderson* and *Wilson* discuss." *Id.* at 354. That misreads *Anderson*: Uncertainty about the result of applying a settled standard "to particular situations" is precisely "the kind of legal uncertainty" that *Anderson* discusses. Gov't Br. 16-21, 34-35 & n.16. Moreover (as we pointed out, *id.* at 37 n.17, and respondent does not deny), demanding that officers identify legal uncertainty at some higher level of generality, as *McNair* does, would "transform[]" the *Harlow* standard "from a guarantee of immunity into a rule of pleading," a result that *Anderson* was designed to avoid. 483 U.S. at 639.

Indeed, notwithstanding respondent's and his amici's extesive reliance on *McNair*, they make no effort to reconcile *McNair*'s analysis with *Anderson*. (Nor does *McNair* itself. *McNair* cites *Anderson*, but does not discuss *Anderson*'s holding or analysis. See Gov't Br. 38 n.18.) For example, respondent (Br. 28-30) and his amici (*e.g.*, ACLU Br. 20-22) cite *McNair* for the proposition that officers should be "strictly liable" for unreasonable searches and seizures because they were strictly liable at common law. But *Anderson* rejected that precise argument. "[W]e have never suggested," the Court declared, "that the precise contours of official immunity can and should be slavishly derived from the often arcane rules of the common law. That notion is

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sonable; that decision is essentially a binary one. Finally, like officers effecting an arrest, officers conducting a search have a range of reasonable options regarding *how* to conduct that search, and may violate the Fourth Amendment if they choose unreasonable means.

plainly contradicted by *Harlow*, where the Court completely reformulated qualified immunity along principles not at all embodied in the common law." The Court continued: "*Harlow* clearly expressed the understanding that the general principle of qualified immunity it established would be applied 'across the board.'" 483 U.S. at 645. Respondent and his amici nowhere explain why that understanding is incorrect, or why strict liability should be substituted for the qualified immunity that *Harlow* and *Anderson* instruct should be applied across the board.[9]

4. Respondent's attempt to equate the qualified immunity inquiry with the test of reasonableness under the Fourth Amendment also suffers from a final defect—it misstates and dilutes the substance of the Fourth Amendment's guarantees. This Court's cases establish that an officer is entitled to qualified immunity for his unconstitutional con-

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[9] *McNair*'s attempt to dismiss qualified immunity in Fourth Amendment cases as a "judicial invention" is not only inconsistent with *Anderson*, but incorrect. This Court long has recognized qualified immunity in excessive force cases. See, *e.g.*, *Wilkes* v. *Dinsman*, 48 U.S. (7 How.) 89, 123, 130-132 (1849) (naval officer protected from "mere errors of judgment" and not liable unless force was animated by "ill-will, a depraved disposition," or "malicious and wilful"). Moreover, as we explained (Gov't Br. 38 n.17), concerns about "judicial invention" are doubly misplaced in this context. Respondent and his amici similarly contradict rather than distinguish *Anderson* when (again following *McNair*) they argue (ACLU Br. 18) that applying qualified immunity—asking "whether a reasonable person would have *realized* that his conduct violates established legal standards—[would] reintroduce[] the element of subjectivity that *Graham* deliberately removed." *McNair*, 234 F.3d at 355-356. This Court rejected that precise argument in *Anderson*. The no-reasonable-officer test of *Harlow* and *Malley*, the Court held, "does not reintroduce into qualified immunity analysis the inquiry into officials' subjective intent * * *. [T]he relevant question in this case, for example, is the objective (albeit fact-specific) question whether a reasonable officer could have believed Anderson's warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed. Anderson's subjective beliefs about the search are irrelevant." 483 U.S. at 641.

duct if an appropriately competent officer, based on established law, reasonably could have believed the conduct to be lawful at the time he acted. Attempting to equate the Fourth Amendment standard with qualified immunity, respondent and his amici state that the *Fourth Amendment* deems an officer's conduct to be "reasonable" within the meaning of constitutional text whenever a reasonable officer could have believed the conduct to be lawful. See, *e.g.*, ACLU Br. 15 (Fourth Amendment determination "necessarily" answers "whether a reasonable officer 'could have believed' his use of force 'to be lawful.'").

That formulation misstates the relevant Fourth Amendment standard. See Gov't Br. 30-31 n.13. It finds no support in *Graham*; that decision specifies that the Fourth Amendment standard is "objective reasonableness," not *arguable* reasonableness in light of pre-existing law. Nor can that formulation be reconciled with constitutional text. The Fourth Amendment bars "unreasonable" seizures. That an officer understandably could have thought his conduct to be reasonable in light of pre-existing law may be a valid reason for declining to impose damages, but it does not make the conduct "reasonable" in contemplation of current law.

Indeed, in his effort to minimize differences between the qualified immunity and Fourth Amendment standards, respondent dilutes the Fourth Amendment itself. See Gov't Br. 31 n.13. An officer enjoys qualified immunity unless pre-existing law would put a reasonable officer on notice that the conduct in question is unlawful. If taken seriously, respondent's effort to equate the Fourth Amendment and qualified immunity standards would require all open legal questions concerning reasonableness of force to be resolved against plaintiffs; whenever pre-existing law did not establish the illegality of the conduct with sufficient clarity, the conduct would remain lawful. Such a rule would freeze the current state of Fourth Amendment law in place. Common sense and the development of Fourth Amendment law—under

which the law gains clarity by the application of the reasonableness standard in novel and concrete contexts—require rejection of that approach. The test for finding a Fourth Amendment violation and the standard for imposing liability on individual officers are, and should remain, distinct. Not every Fourth Amendment violation requires the imposition of personal liability. Nor should courts be barred from providing otherwise appropriate prospective relief against unconstitutional practices merely because those practices were not clearly foreclosed by pre-existing law.

That is not to dispute that the Fourth Amendment provides room for and vindicates reasonable mistakes of *fact*. The ACLU correctly observes (Br. 10) that an officer behaves reasonably, for example, if he justifiably mistakes an innocent object for a gun. But it does not follow that the Fourth Amendment itself allows room for and vindicates mistakes of *law*—no matter how reasonable—regarding the amount of force that society is prepared to accept as reasonable and thus constitutional. To the contrary, the ultimate arbiter of the boundary between lawful and unlawful conduct must remain the *judicial* branch. That an officer reasonably erred in discerning the sometimes unclear boundary between reasonable and unreasonable force may entitle him to qualified immunity. But it does not force the judiciary to declare that conduct lawful.

B. Applying Qualified Immunity Consistent With *Anderson* Does Not Violate The Seventh Amendment

Respondent also claims (Br. 30-45) that applying qualified immunity here is somehow inconsistent with the Seventh Amendment's requirement that the right to trial by jury be "preserved." There is no reason for this Court to address that contention, as it was neither pressed nor passed upon in the court of appeals. See *Davis* v. *United States*, 495 U.S. 472, 488-489 (1990); *Grupo Mexicano de Desarrollo S.A.* v. *Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 n.3 (1999).

The argument is, in any event, without merit. This case arises on summary judgment under Federal Rule of Civil Procedure 56, which fully protects the Seventh Amendment values in the qualified immunity context, as it does in all others. Under Rule 56(c), a court may enter summary judgment only if there is "no genuine issue as to any material fact." Fed. R. Civ. P. 56(c). Consequently, courts deciding qualified immunity issues on summary judgment must resolve all disputes regarding historical facts (what actually happened) in favor of the plaintiff; draw all factual inferences in favor of the plaintiff; and view the evidence in the light most favorable to the plaintiff. See *Behrens* v. *Pelletier*, 516 U.S. 299, 309 (1996); *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248-250 (1986). The normal operation of those requirements prevents the case from going to the jury only if the evidence would be insufficient to support a judgment in the plaintiff's favor—in this context, only where, even under the most plaintiff-favorable set of facts supported by the evidence, a competent officer reasonably could have believed that his conduct was lawful in light of preexisting law. That does not create a Seventh Amendment problem. The Seventh Amendment does not give a plaintiff the right to take his case to trial where the admissible evidence cannot support liability, *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 336 (1979); nor did the common law, *id.* at 349 & n.16 (Rehnquist, J., dissenting) ("[I]n 1791 a demurrer to the evidence, a procedural device substantially similar to summary judgment, was a common practice.").

Of course, qualified immunity necessarily means that some cases that otherwise would have gone to the jury will be resolved at summary judgment instead. That, however, is an inevitable consequence of a qualified immunity doctrine that provides officers an additional margin for error. Offering that additional protection under a *distinct* legal standard does not intrude on the jury's traditional fact-finding role,

and it raises no greater concerns in the excessive force context than in any other.[10]

Respondent's Seventh Amendment argument, in any event, underscores the incompatibility of the Ninth Circuit's approach with *Harlow*'s goal of resolving insubstantial claims before trial. See Gov't Br. 39-42. Under the Ninth Circuit's approach, the case must go to trial unless "the evidence *compels* the conclusion that [the] use of force was reasonable." Pet. App. 15a n.5 (emphasis added). As we have noted (Gov't Br. 39-40), this Court already has rejected a similar formulation of the qualified immunity standard in the probable-cause context because "it routinely places the question of immunity in the hands of the jury." *Hunter*, 502 U.S. at 228. The test for qualified immunity is distinct and facilitates early termination of litigation. After resolving all factual disputes and drawing all factual inferences in favor of the plaintiff, the court must grant the officer qualified immunity unless, under those facts and in light of pre-existing law, *no* appropriately competent officer reasonably could have believed the force was lawful. See *Ellis* v. *Wynalda*, 999 F.2d 243, 246 n.2 (7th Cir. 1993) (summary judgment proper where, viewing the facts most favorably to the plaintiff, "reasonable minds could differ" on the lawfulness of the conduct); *Priester*, 208 F.3d at 927 (immunity proper unless pre-

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[10] Much of respondent's Seventh Amendment analysis addresses the standard applicable *after* verdict in light of the Seventh Amendment's re-examination clause, which provides that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." That issue is not presented by this case; no trial has occurred and no fact has been "tried by a jury." However, just as normal application of summary judgment rules protects Seventh Amendment values before trial, normal application of Federal Rule of Civil Procedure 50 safeguards those values after trial. This Court has recognized that Rule 50 is consistent with the Seventh Amendment. See *Galloway* v. *United States*, 319 U.S. 372, 388-393 (1943); *Weisgram* v. *Marley Co.*, 528 U.S. 440, 449-450.

existing law "truly compel[s] (not just suggest[s] or allow[s] or raise[s] a question about), the conclusion * * * that what defendant [allegedly did] violates federal law").

C. Specialist Saucier Is Entitled To Qualified Immunity

Respondent and his amici largely abandon the Ninth Circuit's application of the Fourth Amendment and qualified immunity standards in this case. Respondent nowhere denies that competent officers—confronted by respondent's open disobedience to the law, with a large crowd behind him, and the Vice President standing a few feet ahead—could have thought it permissible to use surprise to their advantage by seizing respondent quickly and whisking him out of the crowd. Gov't Br. 44-45. Respondent does not insist that the officers should have spoken with him before seizing him, let alone that such a "speak-first" requirement was clearly established by pre-existing law. *Id.* at 45. Nor does he dispute that some modicum of force was *necessary* to remove him from the crowd in light of the fact that he attached himself to the barrier that separated him from the Vice President. See *id.* at 46-47 & n.23.[11]

Instead, respondent primarily relies on what he characterizes as a gratuitously forceful push used to place him inside a military police van. Although he suffered no injury whatsoever, respondent asserts that the push, together with the force used to remove him from the crowd, cumulatively constitute excessive force. See Resp. Br. 3 n.2. Respondent, however, nowhere explains why the two uses of force—each

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[11] Respondent asserts that the officers "dragged" him to the van. Resp. Br. 3 n.2, 9 n.7. Respondent may be asserting merely that he did not proceed to the van willingly. To the extent respondent claims he was lying down or prone, or that there was significant contact and friction between his person and the ground, the record is to the contrary. Respondent testified that the officers "held [him] up in the air," that he did not "make any effort to get [his] feet on the ground" because he "couldn't," and that his feet were at most "barely touching the ground" as he was half-walked, half-carried to the van. J.A. 25.

employed to achieve a different end—should be aggregated; or why the use of otherwise reasonable force to remove respondent from the crowd should affect the permissible force to place him in the van. This is not a case where an earlier use of force may affect the necessity of a later one; it is a case in which each use of force is justified by a separate need. Moreover, even if an earlier use of reasonable force must be treated as a "debit" against the amount of force that can be used later, that rule surely was not so clearly established that Saucier must have been "incompetent" or "knowingly violating the law" when he failed to anticipate it.

More fundamentally, the push upon which respondent places primary reliance does not establish that Specialist Saucier violated respondent's clearly established Fourth Amendment rights. For one thing, respondent ignores a long line of cases—stressed in our opening brief (Gov't Br. 43 n.20, 48-50) and by various amici (*e.g.*, FOP Br. 10-20; NAPO Br. 24-27)—holding significantly greater intrusions to be *de minimis* or otherwise too trivial to be constitutional violations where, as here, no injury resulted. See also *Graham*, 490 U.S. at 396. Nor does *Graham* establish that the minimal force used here was unconstitutional. Although respondent characterizes *Graham* as involving pushes from which "the plaintiff suffered no discernable injury," Resp. Br. 15, the plaintiff in *Graham* suffered "a broken foot, cuts on his wrists, a bruised forehead," an "injured shoulder," and a seemingly permanent "loud ringing in his right ear." 490 U.S. at 390. Respondent, in contrast, claims no physical injury. The force in *Graham* also far exceeded the force here, and included slamming the plaintiff's face into the hood of a car after he was handcuffed. *Id.* at 389. Finally, *Graham* cannot even be read as establishing that the force used there was unreasonable, because the Court did not reach that question, instead remanding to the court of appeals for application of the proper standard. *Id.* at 399.

Respondent also declares that trial in this case is necessary because there is a factual dispute on whether he resisted being placed in the van. Resp. Br. 43 & n.22. We disagree. First, even absent resistance, the shove of which respondent complains did not go so far beyond potentially lawful conduct that no competent officer could have thought it constitutional. See Gov't Br. 48-50. Second, respondent ignores his concession that he engaged in conduct—placing his feet on the bumper—that could have led a reasonable officer to believe he was resisting, even if he was not. See *id.* at 48 n.24. Finally, the undisputed fact that the push did not come from *Saucier*, but instead came from the other officer, is fatal to respondent's suit against Saucier, the lone petitioner before this Court. *Id.* at 50 & n.26.[12] Saucier did "assist" in placing respondent in the van. See Resp. Br. 4 n.4. But respondent does not identify any aspect of that assistance as constitutionally objectionable. Nor does he articulate any basis (much less a clearly established one) for holding Saucier liable for the other officer's conduct. Saucier's own conduct—placing respondent in the van from the left-hand side, rather than the other officer's allegedly offensive push from the right—did not violate respondent's clearly established Fourth Amendment rights. Accordingly, Specialist Saucier should not be forced to endure further proceedings and a time-consuming trial; he is entitled to qualified immunity now.

* * * * *

For the reasons stated above, and for those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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[12] We pointed that fact out in our petition for a writ of certiorari (at 27-28 & n.19), and respondent did not dispute it in his brief in opposition, Gov't Br. 50 n.26. To the extent respondent seeks to dispute that fact now, his effort comes too late. See Sup. Ct. R. 15.2.

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BARBARA D. UNDERWOOD
Acting Solicitor General

MARCH 2001

...TION FILED
DEC 27 2000

Dec 27, 2000

(4)

No. 99-1977

IN THE

Supreme Court of the United States

DONALD SAUCIER,

Petitioner,

vs.

ELLIOT M. KATZ AND IN DEFENSE OF ANIMALS,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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36 pp

QUESTIONS PRESENTED

1) Is the rule of *Graham* v. *Connor*, 490 U. S. 386 (1989) sufficiently particularized to be the relevant "clearly established" standard for determining qualified immunity in excessive force cases?

2) Must any officer who violates the *Graham* standard be also deemed to have violated a clearly established right for the purposes of qualified immunity?

IN THE

Supreme Court of the United States

DONALD SAUCIER,

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vs.

ELLIOT M. KATZ AND IN DEFENSE OF ANIMALS,

Respondents.

MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.3, the Criminal Justice Legal Foundation[1] respectfully moves for leave to file the accompanying brief *amicus curiae* in support of the petitioner. Counsel for petitioner has consented, but counsel for respondents has withheld consent.

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of the victim

1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The decision of the Ninth Circuit in this case effectively ends the defense of qualified immunity in excessive force cases. This will increase officers' risk of litigation based upon the use of force, making law enforcement officers act more cautiously than public safety allows. This threat to public safety resulting from the Ninth Circuit's decision is against the interests CJLF was formed to protect.

For the foregoing reasons, *amicus* requests leave to file its brief.

December, 2000

Respectfully submitted,

CHARLES L. HOBSON

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

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IN THE

Supreme Court of the United States

DONALD SAUCIER,

Petitioner,

vs.

ELLIOT M. KATZ AND IN DEFENSE OF ANIMALS,

Respondents.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

SUMMARY OF FACTS AND CASE

As this case comes to this Court on appeal from denial of summary judgment, the question is whether the facts as alleged by plaintiffs would, if proven, defeat the defense of qualified immunity. On September 24, 1994, Vice President Gore gave a speech at the Presidio Army base in San Francisco, California, as part of a public event celebrating the conversion of most of the Presidio into a national park. *Katz* v. *United States*, 194 F. 3d 962, 965 (CA9 1999). At this time, animal rights activists were concerned that animal experiments were being conducted at the Army's Letterman Hospital. *Ibid.* Plaintiff Katz, a 60-year-old veterinarian, and other members of plaintiff In Defense of Animals (IDA) attended the event. *Ibid.* Katz sat at the front of the public seating area, which was separated from the stage and the dignitary seating area by a waist-high cyclone fence. *Ibid.* Katz, removing a banner from his jacket, moved towards the barrier as the Vice President started speaking. Katz

intended to hang the banner, which read "Please Keep Animal Torture Out of Our National Parks," over the fence so that the Vice President and other dignitaries could read it. *Ibid.*

In his deposition, Katz claimed that "a military police officer 'grabbed [him] from behind and somebody else tore the banner away' " before he could unfurl it. *Ibid.* Those two are the defendants Private Donald Saucier and Sergeant Steven Parker. *Ibid.* Saucier had been told by his superiors that demonstrations would not be allowed. *Ibid.* The two military policemen each took one of Katz's arms and "started sort of picking [Katz] up and kind of walking [him] out, kind of like very hurriedly, sort of like the bum's rush." *Ibid.* Katz was taken to a military van parked behind the seating area, and he claims that Saucier and Parker "violently threw" him inside the van. *Ibid.* Katz claimed "he was able 'to kind of prevent' his head from smashing into the floor of the van . . . ." *Id.*, at 965-966. "With a 'great deal of effort' he was barely able to prevent himself from getting seriously hurt.' " *Id.*, at 966. Katz claims he did not resist arrest, although Saucier disputes this. *Id.*, at 971.

The military police closed the van. Katz was left there for about 20 minutes, until the police put another IDA member in the van. Katz and the other member were then searched and handcuffed. *Id.*, at 966. Next, they were driven to the military police station, where they were briefly detained, and Katz was released. *Ibid.* Katz was not cited. *Ibid.*

Katz and the IDA filed suit "alleging multiple claims against the United States, a national park official, and various military officials." *Ibid.* Katz claimed that Saucier violated his First Amendment free speech right and violated the Fourth Amendment by arresting him without probable cause and with excessive force. *Ibid.* The District Court granted Saucier's summary judgment motions against the free speech and unlawful arrest claims on qualified immunity grounds. The transitional status of the base and the constitutionality of not allowing protests on military bases, see *infra*, at 22, and n. 4,

made Saucier's belief in the legality of the arrest reasonable. *Katz*, *supra*, 194 F. 3d, at 966. The District Court denied Saucier's motion on the excessive force claim, since " 'the qualified immunity inquiry is the same as the inquiry on the merits' " for excessive force claims. *Ibid.* The Ninth Circuit affirmed, following the District Court's reasoning. See *id.*, at 968-969. This Court granted the United States' certiorari petition on November 13, 2000.

SUMMARY OF ARGUMENT

The Ninth Circuit's decision, that an officer who violates *Graham* v. *Connor* is necessarily ineligible for qualified immunity under *Harlow* v. *Fitzgerald*, is incorrect. To understand why, it is important to first understand how *Harlow*'s objective standard advances its policy rationale. *Harlow*'s departure from the common law principles of official immunity was based on policy. Qualified immunity is primarily a means to reduce the high social costs of litigation against government officials. The defense is also fair, as it insulates officials from personal liability through sudden changes in the law. The key to qualified immunity is how these interests are advanced, while maintaining an individual's interest in vindicating his or her rights.

The Ninth Circuit's decision in this case effectively eliminates the qualified immunity defense in excessive force cases. Since it holds that *Graham* provides a clear legal standard for *Harlow* analysis, the law is never ambiguous in excessive force cases. This holding, when combined with the holding that an officer who violates *Graham* is *per se* unreasonable under *Harlow*, prevents an officer from successfully defending an excessive force case through qualified immunity.

Graham does not provide a sufficiently particularized legal standard for qualified immunity analysis. This Court's cases demonstrate that general standards, such as probable cause or the warrant requirement, are too abstract to provide sufficient

guidance for an officer in the field. Like other Fourth Amendment general standards, *Graham*'s balancing test is too abstract for a reasonable officer to know whether a particular use of force is legal. Instead, *Harlow* requires an examination of the cases applying *Graham* to a similar use of force in similar situations, which the Ninth Circuit did not do.

The Ninth Circuit's decision to equate the reasonable officer standards of *Graham* and *Harlow* is also incorrect. In part, this decision stems from a misdirected focus. The focus of any application of *Harlow* should be on determining whether the officer violated a legal standard that was clearly established at the time of the act. *Harlow*'s reasonableness standard flows from this determination.

More importantly, the *Harlow* and *Graham* standards involve different inquiries. *Graham* applies a balancing test to determine whether a use of force is appropriate, while *Harlow* examines the reasonableness of an officer's conclusion that an act was legal. Reasonable people can differ over whether a particular use of force is legal, as demonstrated by this Court's divided opinion in *Tennessee* v. *Garner*. No more can be expected of officers in the field. Therefore, an officer can violate *Graham* and still be entitled to qualified immunity.

Private Saucier's use of force did not violate any clearly established standards. The use of force in this case was minimal, causing no physical injury to the plaintiff. At least two circuits routinely grant qualified immunity in similar situations. Since this case also involves the security of the Vice President, deference to security officers is particularly important. Finally, the two cases cited by the Ninth Circuit to support the finding that Private Saucier acted unreasonably are readily distinguished as each involved much more force in a much less compelling situation than crowd control during the Vice President's speech.

The two-part analysis adopted by the Ninth Circuit is substantially different from this Court's precedents. If this

Court does decide to adopt this approach, it should make clear that this is a change in form and that no reduction in the degree of protection is intended.

ARGUMENT

I. Harlow's objective standard advances its policy rationale by protecting officials from liability due to the retroactive imposition of new standards.

This case provides an excellent example of how labeling can cloud analysis. Cf. *Snyder* v. *Massachusetts*, 291 U. S. 97, 114 (1934) ("tyranny of labels"). The Ninth Circuit reasoned that since the standard for qualified immunity of *Harlow* v. *Fitzgerald*, 457 U. S. 800 (1982) and the standard for evaluating excessive force claims announced in *Graham* v. *Connor*, 490 U. S. 386 (1989) contained very similar language, an officer who acts unreasonably under *Graham* must also be deemed unreasonable for the purposes of *Harlow*'s objective standard. See *Katz* v. *United States*, 194 F. 3d 962, 968-969 (1999). Although linguistically similar, *Harlow* and *Graham* serve distinct purposes and accomplish their separate purposes through separate means. In order to understand why the qualified immunity issue is not the same as the Fourth Amendment reasonable force issue, it is first necessary to understand the policy rationale that forms the basis of this Court's qualified immunity decisions. These policies and the way *Harlow* advances them clearly distinguish the *Harlow* standard from *Graham*.

Although the defense of official immunity itself has strong historical roots, see *Owen* v. *City of Independence*, 445 U. S. 622, 638 (1980), modern qualified immunity law is driven by policy considerations. In *Harlow*, this Court "completely reformulated qualified immunity along principles not at all embodied in the common law . . . ." *Anderson* v. *Creighton*, 483 U. S. 635, 645 (1987). "The transformation was justified

by the special policy concerns arising from public officials' exposure to repeated suits." *Wyatt* v. *Cole*, 504 U. S. 158, 170-171 (1992) (Kennedy, J., concurring); see *Crawford-El* v. *Britton*, 523 U. S. 574, 594, n. 15 (1998).

The *Harlow* Court's decision to replace the malice-based subjective inquiry found at common law with its objective "legal reasonableness" test, see *Anderson*, *supra*, 483 U. S., at 645, was justified by several policies. The most important reason for the change was minimizing the social costs of forcing public officials to defend against numerous damage actions. "As recognized at common law, public officers require this protection to shield them from undue interference with their duties and from potentially disabling threats of liability." *Harlow*, *supra*, 457 U. S., at 806. The threat of suits against innocent officials has many social costs.

> "These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.' " *Id.*, at 814.

These interests require that qualified immunity must be more than a mere shield against liability. In order to protect officials and society from the debilitating effects of unnecessary litigation, qualified immunity must stop insubstantial suits well before trial. A successful defense to liability at trial can be a Pyrrhic victory for the beleaguered government official. Trials, even successful ones, can be very expensive. Even reimbursement from the government does not end the official's troubles. "There is still a social stigma attached to being named a defendant in a lawsuit, especially if one is accused of violating someone's constitutional rights. Discovery may well bring out embarrassing facts unrelated to the lawsuit. Furthermore, the disruption, prying, and other aggravation makes the job more stressful." Note, Passing the Buck: The Supreme Court's

Failure to Clarify Qualified Immunity Doctrine to Protect Public Officials from Frivolous Lawsuits, *Crawford-El* v. *Britton*, 118 S. Ct. 1584 (1998), 22 Harv. J. L. & Pub. Pol'y 1031, 1047 (1999).

An effective qualified immunity defense is not merely a defense to liability, but a means for avoiding litigation. The early termination of lawsuits is therefore an essential function of qualified immunity. See *Harlow*, *supra*, 457 U. S., at 814. This interest led this Court to abandon the common law subjective component of the defense. Since allegations of improper motive could rarely be decided on a summary judgment motion, the subjective element of the good-faith defense was dropped so that qualified immunity could resolve unsubstantial suits before trial. See *id.*, at 816-818. "The entitlement is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell* v. *Forsyth*, 472 U. S. 511, 526-527 (1985) (emphasis in original). Accordingly, this Court "repeatedly [has] stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter* v. *Bryant*, 502 U. S. 224, 227 (1991) (*per curiam*) (collecting cases).

Society's interest in avoiding burdening government officials with unnecessary trials does not exist in a vacuum. "In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Harlow*, *supra*, 457 U. S., at 814. This must be balanced against the substantial social costs that can arise from suits against government officials. *Ibid.*; *Anderson* v. *Creighton*, *supra*, 483 U. S., at 638. How this Court strikes the balance is the key to understanding the scope of the defense. "Our cases have accommodated these conflicting concerns by generally providing government officials performing discretionary functions with a qualified immunity, shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to

have violated." *Anderson*, 483 U. S., at 638. That is, immunity is granted to officials "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person should have known." *Harlow*, 457 U. S., at 818. This is an objective good-faith defense, centered on the status of the law at the time of the act. The *Harlow* standard does not require an examination of the act's reasonableness itself. Instead, it is only the official's conclusion that the act was legal that must be reasonable.

In addition to minimizing the social costs of suits against government officials, qualified immunity's objective standard is also fair. While "it is not unfair to hold liable the official who knows or should know he is acting outside the law," *Butz* v. *Economou*, 438 U. S. 478, 506 (1978), "officials will not be liable for mere mistakes of judgment, whether the mistake is one of fact or one of law." *Id.*, at 507. Government officials are subject to a vast, increasingly complicated set of federal constitutional and statutory restrictions. For example, the major legal treatise on the constitutional provision at issue in the present case runs to five volumes. See W. LaFave, Search and Seizure (3d ed. 1996). It is simply unreasonable to expect army privates or police to anticipate changes in the law. Therefore

> "focusing on 'the objective *legal* reasonableness of an official's acts,' [citation] avoids the unfairness of imposing liability on a defendant who 'could not reasonably be expected to anticipate subsequent legal developments, nor . . . fairly be said to "know" that the law forbade conduct not previously identified as unlawful [citation].' " *Crawford-El* v. *Britton*, *supra*, 523 U. S., at 590 (emphasis added) (quoting *Harlow*, *supra*, 457 U. S., at 818, 819).

Harlow's reasonableness standard is ultimately a protection from liability due to the retroactive application of new legal standards or unanticipated applications of existing general standards. "The purpose of the doctrine of official immunity is to protect officials from legal surprises." *Nelson* v. *Streeter*, 16 F. 3d 145, 151 (CA7 1994) (Posner, J.). The *Harlow* standard

"gives ample room for mistaken judgments," protecting "all but the plainly incompetent or those who knowingly violate the law." *Malley* v. *Briggs*, 475 U. S. 335, 341, 343 (1986). The defense thus gives officials a margin of error around all but clearly defined rights, a necessity in an increasingly complex legal environment. Cf. *Anderson*, *supra*, 483 U. S., at 644 (qualified immunity necessary to protect officers making often difficult Fourth Amendment decisions).

> "These officials are subject to a plethora of rules, 'often so voluminous, ambiguous, and contradictory, and in such flux that officials can only comply with or enforce them selectively.' See P. Schuck, Suing Government 66 (1983). In these circumstances, officials should not err always on the side of caution. '[O]fficials with a broad range of duties and authority must often act swiftly and firmly at the risk that action deferred will be futile or constitute virtual abdication of office.' " *Davis* v. *Scherer*, 468 U. S. 183, 196 (1984) (quoting *Scheuer* v. *Rhodes*, 416 U. S. 232, 246 (1974)).

Since qualified immunity is derived from policy considerations, the defense must be interpreted in light of these policies. The official's margin of error must be preserved by paying careful attention to the state of the law at the time of the act. "This is not to say that an official action is protected by qualified immunity unless the very action has previously been held unlawful, [citation]; but it is to say that in light of pre-existing law the unlawfulness must be apparent." *Anderson*, *supra*, 483 U. S., at 640. The court below did not follow the path set out by this Court. Its cursory examination of the relevant law, if upheld, would force many police officers into needlessly involved and expensive defenses against insubstantial claims. The Ninth Circuit's summary conclusion that Private Saucier's alleged acts would violate the Fourth Amendment's excessive force component is the type of surprise to officials that qualified immunity is meant to prevent.

II. The Ninth Circuit's decision incorrectly foreclosed the qualified immunity defense in excessive force cases.

The Ninth Circuit's decision, if upheld, would effectively eliminate the qualified immunity defense in excessive force cases. This conclusion is based upon an incorrect application of the qualified immunity standard of *Harlow* v. *Fitzgerald*, 457 U. S. 800 (1982) and the improper equating of the *Harlow* standard with the standard for Fourth Amendment reasonable force claims found in *Graham* v. *Connor*, 490 U. S. 386 (1989). Qualified immunity has a separate existence from *Graham*'s excessive force standard; a particular use of force can be excessive under *Graham* yet still be protected under qualified immunity if the legal status of that particular use of force was unclear at the time of the act. Contrary to the Ninth Circuit's reasoning, there is a margin of error in excessive force cases.

A. Eliminating the Defense.

Despite its claims to the contrary, the Ninth Circuit's decision eliminates qualified immunity as an effective defense in Fourth Amendment excessive force cases. The Ninth Circuit began its inquiry by dividing the *Harlow* standard into two parts.[1] First, a court was to ascertain whether the relevant law was clearly established. If the law was unclear, then immunity was granted. If the law was clear, then " 'we proceed to ask if under that law, a reasonable official could have believed that the conduct was lawful.' " *Katz* v. *United States*, 194 F. 3d 962, 967 (CA9 1999) (quoting *Somers* v. *Thurman*, 109 F. 3d 614, 617 (CA9 1997)). Next, the court summarized the reasonableness standard for evaluating excessive force claims set forth in *Graham* v. *Connor*, 490 U. S. 386 (1989). *Katz*, 194 F. 3d, at 967-968.

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1. This is incorrect, as the *Harlow* standard does not have two parts. See *infra*, at 17-18.

What followed is central to this case. Instead of determining whether *Graham* established a sufficiently clear standard under *Harlow*, it skipped to the reasonableness inquiry. Noting that both *Graham* and *Harlow* evaluated the reasonableness of the officer's conduct, the Ninth Circuit " held that 'the inquiry as to whether officers are entitled to qualified immunity for the use of excessive force is the same as the inquiry on the merits of the excessive force claim.' " *Id.*, at 968 (quoting *Alexander* v. *County of Los Angeles*, 64 F. 3d 1315, 1322 (CA9 1995)). From this followed the inevitable conclusion that unless the court could conclude that as a matter of law the level of force was reasonable under *Graham*, summary judgment was improper in excessive force cases. See *id.*, at 969.

Defendants do not have to prove that they acted legally in order to receive qualified immunity. The defense advances the policies that "officials should not always err on the side of caution." *Davis* v. *Scherer*, 468 U. S. 183, 196 (1984). Thus in a search case, an officer who reasonably, but mistakenly, concludes that he has probable cause is entitled to qualified immunity. See *Hunter* v. *Bryant*, 502 U. S. 224, 228-229 (1991) (*per curiam*). By eliminating the officer's margin of error, the Ninth Circuit eliminates the defense.

The decision asserts that qualified immunity is still available "when the law governing his or her conduct was not clearly established . . . ." *Katz*, *supra*, 194 F. 3d, at 970. Although the Ninth Circuit never explicitly stated what the clear legal standard was under *Harlow*, it must have concluded that some decision provided clear authority, since qualified immunity was denied to Private Saucier. Since the court equated the *Graham* and *Harlow* standards, *Graham* must be the clear legal standard that the Ninth Circuit used to deny immunity. This is consistent with circuit precedent implying that *Graham* is the clear standard. Compare *Headwaters Forest Defense* v. *County of Humboldt*, 211 F. 3d 1121, 1141 (CA9 2000), with *Graham*, *supra*, 490 U. S., at 396. Because *Graham* applies to every Fourth Amendment excessive force

case, the law will always be deemed "clear" in these cases if the decision below is upheld. The Ninth Circuit's promise of a still-existing qualified immunity defense in excessive force cases is a Potemkin Village. Thus, when denying qualified immunity on summary judgment in an excessive force case, a Ninth Circuit panel concluded, "The inherently fact-specific determination whether the force used to effect an arrest was reasonable under the Fourth Amendment should only be taken from the jury *in rare cases*." *Headwaters Forest Defense*, 211 F. 3d, at 1140 (emphasis added). In reality, few, if any, defendants can satisfy the Ninth Circuit's standard, as the Ninth Circuit has all but admitted.

B. Too Abstract.

The first problem with the Ninth Circuit's analysis is that it defines the "clearly established statutory or constitutional rights," *Harlow*, *supra*, 457 U. S., at 818, at too high a level of abstraction. The Court's reliance on *Graham*, *supra*, for the appropriate legal authority for *Harlow*, see *supra*, at 11-12, contradicts this Court's treatment of qualified immunity in other Fourth Amendment contexts. In *Anderson* v. *Creighton*, 483 U. S. 635, 637 (1987), Anderson, an FBI agent, conducted a warrantless search of the Creightons' home because he believed that a suspected bank robber was hiding there. The Eighth Circuit held that the relevant legal standard under *Harlow* was the Fourth Amendment right to be free from warrantless searches of one's home absent exigent circumstances and probable cause, a clearly established right at the time of the search. *Id.*, at 638. The Court of Appeals concluded that qualified immunity was improper since the defendant violated this clearly established right. See *ibid.*

In reversing this decision, the *Anderson* Court demonstrated how courts should address this aspect of the *Harlow* standard. It noted that "[t]he operation of this [*Harlow*] standard, . . . however, depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified." *Id.*, at 639.

Most constitutional rights are derived from very clear, but very abstract constitutional provisions. "For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right." *Ibid.* Accepting this analysis would be the end of qualified immunity. "Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability by alleging violation of extremely abstract rights." *Ibid.* This would transform *Harlow* into a mere "rule of pleading," destroying the careful balance between individual and societal interests. *Ibid.*

> "It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.*, at 640.

While qualified immunity can be denied even when the specific action has not yet been held unlawful, the illegality still "must be apparent" under "pre-existing law . . . ." *Ibid.* In Anderson's case, this required deciding whether "it was *not* clearly established that the circumstances with which Anderson was confronted did not constitute probable cause and exigent circumstances." *Id.*, at 640-641 (emphasis in original). Since "it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present," or that exigent circumstances exist, "in such cases those officials—like other officials who act in ways they reasonably believe to be lawful—should not be held personally liable." *Id.*, at 641. Therefore Anderson would be granted summary judgment if he could establish "that in light of the clearly established principles governing warrantless searches,

he could, as a matter of law, have reasonably believed that the search of the Creighton's home was lawful." *Ibid.*

This analysis is missing from the decision below. The Ninth Circuit did not address the vital issue of what are the relevant "clearly established principles" governing Private Saucier's alleged use of force with any depth. Instead, it operated under the assumption that *Graham* provided the appropriately clear law. See *supra*, at 11-12. Although relevant to the qualified immunity inquiry, the *Graham* standard is too abstract to provide the clear legal standard required under *Harlow*.

Graham provides the general framework for assessing whether a particular use of force is legal under the Fourth Amendment. This, like most general standards found in Fourth Amendment precedent, operates through a balancing test. Under *Graham*'s objective standard, "the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham*, *supra*, 490 U. S., at 397. Courts applying this test must pay "careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.*, at 396. This judgment is made "from the perspective of the reasonable officer on the scene rather than with the 20/20 vision of hindsight." *Ibid.*

The relevant legal rules must be much more specific than this before they can provide *Harlow*'s clear standard. *Graham* governs every use of force that is regulated by the Fourth Amendment. Stating that the reasonableness of the use of force is determined by an objective balancing of the interests based upon the circumstances of the case is not by itself enough to put an officer on notice that a particular use of force is illegal. More is needed, like the cases applying *Graham* to specific uses of force. See, *e.g.*, *Soares* v. *State of Connecticut*, 8 F. 3d 917,

922 (CA2 1993) ("In the present case, the right in question is the right not to be handcuffed in the situation presented to the arresting officers"). Although a case on point is not necessary, there must be enough authority so that the unlawfulness of the act is obvious. See *United States* v. *Lanier*, 520 U. S. 259, 269-272 (1997).

Any doubt about the necessary level of specificity under *Harlow* was resolved in *Wilson* v. *Layne*, 526 U. S. 603 (1999). In that case, United States Marshals and local police allowed a reporter and photographer from the Washington Post to accompany them as they executed an arrest warrant in a private home. *Id.*, at 607-608. As in *Anderson*, the immunity issue turned on defining the relevant right specifically enough. See *id.*, at 614-615. Reiterating what this Court explained in *Anderson*, "the right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established." *Id.*, at 615. The clearly established right must be very specific. "In this case, the appropriate question is the objective inquiry of whether a reasonable officer could have believed that bringing members of the media into a home during the execution of an arrest warrant was lawful, in light of clearly established law and the information the officers possessed." *Ibid.*

This type of inquiry has not yet been made in this case. In this case, the appropriate question is whether a reasonable officer in Private Saucier's position could have believed that the level of force he exerted was lawful in light of clearly established law and the information he possessed. Cf. *ibid.* The Court of Appeals did not answer that question correctly. See part III, *infra*.[2]

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2. At the end of its opinion, the Ninth Circuit concludes that "no reasonable officer could have believed that the amount of force [Saucier] used was lawful." *Katz*, *supra*, 194 F. 3d, at 970. It cited decisions from two other circuits to support this conclusion. See *ibid.* (citing *Sheth* v. *Webster*, 145 F. 3d 1231, 1238 (CA11 1998); *Alexis* v. *McDonald's*

C. The Reasonableness Trap.

The Ninth Circuit's errors in this case did not end with its choice of *Graham* v. *Connor* as the relevant legal standard for the qualified immunity analysis. See part II B, *supra*. It compounded its mistake by equating the reasonable officer standards of *Harlow* and *Graham*. See *Katz*, *supra*, 194 F. 3d, at 968. This position asserts that since an officer's use of force must be objectively unreasonable to violate *Graham*, then the officer cannot have acted reasonably to receive qualified immunity under *Harlow*'s objective standard. See *id.*, at 969. Although this position may have some surface appeal, this is "simplistic" analysis. See Eskow & Cole, The Unqualified Paradoxes of Qualified Immunity: Reasonably Mistaken Beliefs, Reasonably Unreasonable Conduct, and the Specter of Subjective Intent That Haunts Objective Legal Reasonableness, 50 Baylor L. Rev. 869, 879 (1998). Focusing on the term "reasonable" to the exclusion of the differences between the *Harlow* and *Graham* standards is an analytical trap. Although both cases use this term, "reasonable" qualifies two different decisions made by the officer.

Before separating *Harlow* and *Graham*, it is necessary to address the manner in which the Ninth Circuit analyzed the qualified immunity question. The Ninth Circuit divides the *Harlow* test into two parts:

> "To determine whether an official is entitled to qualified immunity, we conduct a two-part analysis: (1) We consider whether the law governing the official's conduct was clearly established. If it was not clearly established, the official is entitled to immunity from suit. (2) If the law was

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Restaurants of Massachusetts, Inc., 67 F. 3d 341, 353 (CA1 1995)). Both cases are readily distinguished from the present case. See part III, *infra*, at 23-24. This analysis was made in rebuttal to Saucier's "fallback position" that the use of force "was so minimal that it was *per se* reasonable." *Ibid.* Such sparse analysis is not a proper determination of the relevant clear legal standard.

> clearly established, we proceed to ask if under that law, a reasonable official could have believed the conduct was lawful." *Katz*, *supra*, 194 F. 3d, at 967 (quoting *Somers* v. *Thurman*, 109 F. 3d 614, 617 (CA9 1997)).

Since it incorrectly assumed that *Graham* provided the clear standard to govern Private Saucier's alleged use of force, see part II B, *supra*, its discussion of *Harlow* and *Graham* was directed towards this "second prong of the qualified immunity defense . . . ." *Id.*, at 968.

The Ninth Circuit's analysis reflects its misplaced analytical priorities. The key question in virtually every qualified immunity case is determining whether the official violated a clear legal standard. Qualified immunity protects officials by preventing the retroactive application of new standards to their official acts. See part I, *supra*. Just as immunity flows from unclear law, liability follows the violation of clearly established standards. See *Harlow*, *supra*, 457 U. S., at 818-819. Therefore the existence of clear legal standards is inextricably linked to *Harlow*'s reasonableness standard. Barring a reasonable mistake of fact, see *Butz* v. *Economou*, 438 U. S. 478, 507 (1978), the violation of a clear legal standard leads to liability.

The Ninth Circuit's decision to bifurcate *Harlow* is thus incorrect. " '[C]learly established' for the purposes of qualified immunity means that '[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.' " *Wilson*, *supra*, 526 U. S., at 614-615 (quoting *Anderson*, *supra*, 483 U. S., at 640). The Court of Appeals' attempt to distinguish *Anderson*, *supra*, as only addressing one "prong" is similarly incorrect. *Anderson* cannot be distinguished because it addresses the one and only "prong" of *Harlow*. See *Katz*, *supra*, 194 F. 3d, at 969-970, n. 4. Under *Harlow*'s indivisible standard, the established rule of law at the requisite level of specificity is the key question, which the Ninth Circuit failed to answer. See part II B, *supra*.

The *Anderson* Court confronted the relationship between Fourth Amendment reasonableness and *Harlow*'s use of that term. The fact that searches and seizures that violate the Fourth Amendment are "necessarily . . . *unreasonabl*[e]" did not foreclose qualified immunity for Fourth Amendment violations. See *Anderson*, *supra*, 483 U. S., at 643 (emphasis in original). The plaintiff's argument in *Anderson* was, "It is not possible . . . to say that one 'reasonably' acted unreasonably." *Ibid.* That argument was contrary to precedent, as qualified immunity had previously been extended to Fourth Amendment violations. See *ibid.* Furthermore, "the precise content of most of the Constitution's civil liberties guarantees rests upon an assessment of what accommodation between governmental need and individual freedom is reasonable . . . ." *Id.*, at 643-644. For the Fourth Amendment, as for these other provisions, a buffer zone is needed between the limit of government authority, as measured by "reasonableness," and the threshold of personal liability. Given the difficulty of determining whether a search or seizure is legal, officers who make objectively reasonable decisions regarding the legality of searches and seizures "should no more be held personally liable in damages than should officials making analogous determinations in other areas of law." *Id.*, at 644.

There is no reason to separate an officer's use of force from the rest of the Fourth Amendment for the purpose of qualified immunity. Like the rest of the Fourth Amendment, the *Graham* standard involves a "careful balancing" of individual freedom and government interests. See *Graham*, *supra*, 490 U. S., at 396. This "objectively reasonable" inquiry, see *id.*, at 397, is fundamentally different from what a court must decide under *Harlow*.

While the *Harlow* standard reflects a balancing of interests, see *supra*, at 7-8, there is no balancing when applying this test. Instead, *Harlow* examines the reasonableness of the officer's conclusion that the act was legal. Thus, where reasonably competent officials could disagree on the issue, then immunity

will be granted. *Malley* v. *Briggs*, 475 U. S. 335, 341 (1986). More importantly, "[i]f judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Wilson*, *supra*, 526 U. S., at 618.

Since judges can and do disagree over whether a particular use of force is reasonable, it follows that an officer can reasonably but incorrectly conclude that a particular use of force is legal. As *Graham* requires a "*careful* balancing" of private and government interests, *Graham*, *supra*, 490 U. S., at 396 (emphasis added), it is inevitable that reasonable people will disagree over whether a particular application of force is legal under *Graham*. *Tennessee* v. *Garner*, 471 U. S. 1 (1985) demonstrates that reasonable judges can disagree over the propriety of the use of force in a particular case. While *Garner* predated *Graham*, it applied a similar balancing test. See *id.*, at 7-8; accord *Graham*, 490 U. S., at 396. While a majority of the *Garner* Court held that using lethal force against an unarmed, fleeing, nondangerous nighttime burglary suspect was excessive, see *Garner*, 471 U. S., at 11, three justices emphatically disagreed with this conclusion, finding a different balance of interests. See *id.*, at 26-30 (O'Connor, J., dissenting). In light of this split, and the officer's reliance on a previously valid Tennessee statute authorizing this use of force, see *id.*, at 4-5, it is no surprise that the *Garner* Court took pains to point out that none of the individual defendants would be held liable in that case. See *id.*, at 22. It is unfair to expect officers in the field to act with a unanimity that this Court cannot find.

It is unreasonable to hold officers personally liable for a use of force if they simply fail to guess which way the balance of interests eventually falls. Barring more specific, clearer guidance than *Graham*, officers can be immune from monetary damages even if the force is subsequently found to violate the Fourth Amendment. Since Private Saucier has not violated any clear standards regarding the use of force, see part III, *infra*, he is entitled to qualified immunity.

III. A reasonable officer could believe that the use of force alleged in this case was lawful in light of clearly established law.

One common characteristic of all excessive force claims is that they are almost always very fact specific. Each use of force is slightly different from the other except for the absolute of deadly force. Similarly, each arrestee will differ from the next, as will the circumstances surrounding the arrest. Therefore, determining the legality of a particular use of force "requires careful attention to the facts and circumstances of each particular case . . . ." *Graham* v. *Connor*, 490 U. S. 386, 396 (1989). This leads to a very idiosyncratic body of law, with each case turning on its own particular set of facts.

Fortunately, qualified immunity does not turn on finding a case on point. "This is not to say that an official action is protected by qualified immunity unless the action in question has previously been held unlawful, [citation]; but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Anderson* v. *Creighton*, 483 U. S. 635, 640 (1987). Looking to cases involving similar uses of force in comparable situations, the illegality of Private Saucier's actions was not apparent in light of the law as it stood on September 24, 1994.

The reasonableness of Private Saucier's legal conclusions is derived from two facets of the encounter. First, the amount of force involved is rather small. Katz merely alleges that Saucier and another officer grabbed him, tore the sign from his hands, gave a type of "bum's rush" and then " 'violently threw' him inside" the van. *Katz* v. *United States*, 194 F. 3d 962, 965 (CA9 1999). Although Katz claims that it took considerable effort to keep himself from being seriously hurt when he was thrown into the van, see *id.*, at 965-966, the fact remains that he suffered no real harm and that the authorities used little real force against him. Two circuits routinely grant qualified immunity in cases of "de minimis" force and little, if any, actual injury. See *Curd* v. *City Court of Judsonia, Arkansas*, 141 F. 3d 839, 841 (CA8 1998); *Nolin* v. *Isbell*, 207 F. 3d 1253,

1255-1257 (CA11 2000). If an officer can make an arrest, then he or she has the right to use at least some force. "Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Graham*, *supra*, 490 U. S., at 396. " 'Not every push or shove, even if it may later seem unnecessary in the peace of the judge's chambers,' [citation], violates the Fourth Amendment." *Ibid.*

While a lack of substantial injury may not be dispositive, see *Wilks* v. *Reyes*, 5 F. 3d 412, 416 (CA9 1993), it is highly relevant to the reasonableness of the use of force. See *Meyer* v. *Robinson*, 992 F. 2d 734, 739 (CA7 1993) ("no injury gives weight to the assertion of no excessive force"). The fact that there was no actual harm, when coupled with the minimal force involved, strongly favors the reasonableness of the use of force.

A second factor supporting qualified immunity is the need to protect the Vice President. Sadly, experience teaches us that highly visible public officials are subject to a real risk of harm during public appearances. Although the President is the most obvious target, other prominent figures can face real danger at public events. See, *e.g.*, *People* v. *Sirhan*, 7 Cal. 3d 710, 718, 497 P. 2d 1121, 1125-1126 (1972) (assassination of Senator Kennedy), overruled on other grounds, *Hawkins* v. *Superior Court*, 22 Cal. 3d 584, 593, 586 P. 2d 916, 922 (1978).

Those who protect our highest officials must be allowed to react quickly to any potential threat. Presidents Reagan and Ford both narrowly averted assassination because of the rapid reaction to the threats by security officials. See E. Magnuson, *Six Shots at a Nation's Heart*, Time, April 13, 1981, at 26-29 (Reagan); *The Girl Who Almost Killed Ford*, Time, Sept. 15, 1975, at 10-11 (Ford). Therefore, while the interest in protecting the President is paramount, see *Hunter* v. *Bryant*, 502 U. S. 224, 229 (1991) (*per curiam*), officers should have similar freedom to protect the nation's second highest constitutional officer through crowd control.

Even though Katz alleges that he clearly posed no direct threat to the Vice President, it is still necessary to view Private Saucier's actions in light of very real security concerns. Maintaining crowd control is an essential element of protecting public speakers like the Vice President. Although the demonstrators themselves may not intend to harm the speaker, certain types of public demonstrations can divert the attention of security officials from greater threats.[3] Private Saucier was given a valid order that demonstrators would not be allowed on the Presidio,[4] and that he should diffuse such situations without drawing more attention than necessary. *Katz*, *supra*, 194 F. 3d, at 965. Katz started moving towards the barrier, just as the Vice President started to speak. While Katz only removed a banner from his jacket, *ibid.*, Saucier necessarily had little time to react. Private Saucier must be allowed to use some force to quickly remove such a disruption from the scene before something far more threatening could have developed.

The Ninth Circuit concluded that "[f]rom all that appears at this stage of the case, he [Katz] did not pose an immediate threat to the safety of the officers or anyone else." *Id.*, at 970. This is the type of judicial second-guessing of an officer in the field that *Graham* forbids. "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham*, *supra*, 490 U. S., at 396-397. Private Saucier cannot

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3. *Amicus* does not imply that security officials are given carte blanche when dealing with such demonstrations. Protecting public demonstrations comes under the First Amendment, and Private Saucier was granted qualified immunity on the First Amendment claims. See *supra*, at 2.

4. Cf. *Greer* v. *Spock*, 424 U. S. 828, 838 (1976) ("no generalized constitutional right to make political speeches or distribute leaflets" on a military base).

consult the federal reports or Professor LaFave's treatise before making up his mind.

The Ninth Circuit itself recognizes that some force is necessary to disperse illegal demonstrators. In *Forrester* v. *City of San Diego*, 25 F. 3d 804, 805-806 (CA9 1994), San Diego police used "pain compliance techniques" to disperse anti-abortion protesters who refused to stop blocking access to medical clinics. The Court upheld a jury's finding of reasonable force. It first noted that the force used here "was less significant than most claims of force. The police did not threaten or use deadly force and did not deliver physical blows or cuts." *Id.*, at 807. Instead, they inflicted pain through "physical pressure administered on demonstrators' limbs in increasing degrees . . . ." *Ibid.* Given the legitimate government interest in maintaining order and protecting public safety, this use of force was reasonable. *Ibid.* The fact that dragging and carrying protesters may have been more reasonable was irrelevant. See *id.*, at 807-808.

While not identical to this case, *Forrester* illustrates the reasonableness of what Private Saucier did. The present case does involve fewer protesters, but much less force is involved in this case than in *Forrester*. Furthermore, this case involves the special security concerns surrounding the Vice President. *Forrester* may not make Private Saucier's legal conclusions correct, but it makes them more reasonable.

The two cases cited by the Ninth Circuit to support its conclusion that Private Saucier acted unreasonably, see *Katz*, *supra*, 194 F. 3d, at 970, are readily distinguishable. *Sheth* v. *Webster*, 145 F. 3d 1231 (CA11 1998) involved a dispute between the plaintiff, a landlord, and officer Webster over whether Sheth should return some money to one of her tenants. See *id.*, at 1234. After being contradicted by Sheth, Webster committed an unprovoked assault against her. This included repeatedly pushing her to the point that "plaintiff cried to Webster that he was hurting her. According to one witness, he kneed the plaintiff in the stomach. Sheth fell back against a

Coke machine five to twelve feet from where she stood." *Ibid.* After that, Officer Webster handcuffed her by one arm and dragged her to his car, eventually shoving her inside. *Ibid.* At one point, "[p]eople around began to shout at Webster to stop, that he was hurting her." *Ibid.* This is a far cry from the minimal, injury-free force used to help maintain crowd control around the Vice President.

Alexis v. *McDonald's Restaurants of Massachusetts, Inc.*, 67 F. 3d 341 (CA1 1995) is similarly distinguishable. In that case, the plaintiff, who was asked to leave a McDonald's after a dispute with the management, was "pulled from the booth, and across the table, *with sufficient force to bruise her legs*, then handcuffed with her hands behind her back and dragged and carried into a police cruiser and pushed inside." *Id.*, at 353 (emphasis added). Once again, the force is greater, and the threat smaller than in this case.

It is not necessary that Private Saucier's actions were clearly legal at that time. Instead they must merely be not clearly illegal. The force employed by Private Saucier allowed a speedy removal of Katz from the Vice President's presence. Given the minimal force employed, the lack of harm to Katz, and the heightened security interests, a reasonable officer could conclude that Private Saucier acted lawfully. He should not be hamstrung by judicial second-guessing.

IV. If the Court does adopt the Ninth Circuit's two-part test, adjustments are necessary to maintain the current level of qualified immunity protection.

As noted earlier, this Court's immunity cases to date do not establish the two-part analysis set forth in the Court of Appeals' opinion. Cf. *Katz* v. *United States*, 194 F. 3d 962, 967 (CA9 1999); see *supra*, at 17-18. However, a few words about the proper formulation of such a test are in order, in case this Court should adopt such an analysis in the present case.

A two-part analysis would bear considerable resemblance to the habeas analysis under 28 U. S. C. § 2254(d)(1) explained last term in *Terry Williams* v. *Taylor*, 529 U. S. __, 146 L. Ed. 2d 389, 120 S. Ct. 1495 (2000). The first step, identification of the "clearly established" governing rule, would be the same. See *id.*, at 429-430, 120 S. Ct., at 1523. The second step, however, would be broader, *i.e.*, providing more latitude to public officials faced with personal liability than is allowed for a challenge to an arguably wrong criminal judgment.

Williams disapproved the "reasonable jurist" standard in the habeas context. See *id.*, at 428, 120 S. Ct., at 1522. For immunity, though, the protection for officials must be *at least* that broad. If a reasonable judge could believe that a particular use of force under given circumstances was legal, it necessarily follows a reasonable police officer could reach the same conclusion. See *supra*, at 19.

Where the rule of law involves a "reasonableness" element, the second step may involve a second-stage "reasonableness" inquiry. For example, the prejudice element of ineffective assistance in *Williams* did not turn on the original question of "reasonable probability" of a different result from *Strickland* v. *Washington*, 466 U. S. 668, 694 (1984). Instead, the question was whether the state court's application of this standard to the facts of the case was reasonable. See *Williams*, *supra*, 146 L. Ed. 2d, at 431, 120 S. Ct., at 1524 (opinion of O'Connor, J.). Mere disagreement on the original "reasonable probability" assessment would not have been enough. See *id.*, at 428-429, 120 S. Ct., at 1522.

Similarly, applying the general rule of "reasonable force" to the facts of particular cases very often leaves room for reasonable disagreement over whether the line has been crossed. The policies underlying qualified immunity require that such disagreements be resolved in favor of the officer, and that the defense be available on summary judgment. See *Harlow*, *supra*, 457 U. S., at 815-816 (rejecting subjective inquiries as

incompatible with the goal of resolving immunity claims on summary judgment).

A change to a two-part analysis would soften the requirement that the "clearly established" right be "particularized." See *supra*, at 13; *Anderson* v. *Creighton*, 483 U. S. 635, 640 (1987). The protection formerly provided in the particularization requirement would be moved into the second, "unreasonable application" step. If the Court does decide to make this change, *amicus* suggests that it be quite explicit that this is a change in form but that no reduction in the degree of protection is intended. Language in earlier cases based on the single-part, particularized right analysis would have to be reexamined. For example, *Harlow*, *supra*, 457 U. S., at 818-819, states, "If the law was clearly established, the immunity defense ordinarily should fail . . . ." That would no longer be true under the two-part analysis. A clearly established but general rule of law would not defeat the defense, but merely move the analysis to the second step.

In the present case, either analysis brings us to the same result. We begin with the premise that Parker and Saucier's decision to arrest Katz was either legal or within the perimeter of qualified immunity. See *supra*, at 2. There is no particularized rule which necessarily precluded the amount of force used to effectuate this arrest, and hence Saucier prevails under the traditional one-step *Harlow/Anderson* approach. See part III, *supra*. Under a two-part approach, properly applied, the question would be whether an officer could reasonably *believe* that the amount of force used was on the legal side of the *Graham* v. *Connor* line. This is a very different question from whether it actually *was* on the right side of the line. Cf. *Williams* v. *Taylor*, *supra*, 146 L. Ed. 2d, at 428-429, 120 S. Ct., at 1522. For the same reasons discussed in part III, *supra*, Private Saucier comes within the perimeter of qualified immunity.

CONCLUSION

The decision of the Ninth Circuit Court of Appeals should be reversed.

December, 2000

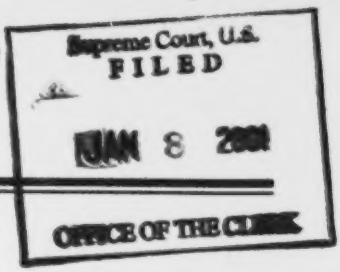
Respectfully submitted,

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JAN 8 2001

(5)



No. 99-1977

IN THE

Supreme Court of the United States

DONALD SAUCIER,

Petitioner,

v.

ELLIOT M. KATZ AND IN DEFENSE OF ANIMALS,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* THE GRAND LODGE OF THE FRATERNAL ORDER OF POLICE IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*

The Grand Lodge of the Fraternal Order of Police ("FOP"), with the consent of the parties, files this *amicus curiae* brief supporting reversal of the opinion by the Ninth Circuit in *Katz v. Saucier*, 194 F.3d 962 (9th Cir. 1999).[1] The FOP is interested in this case because the opinion below sets a dangerous precedent regarding a police officer's qualified immunity in a Fourth Amendment, excessive force case.

Police officers routinely are authorized and trained in the use of reasonable force in making lawful arrests. The opinion below exposes officers to litigation and potential liability for using even minimal force to take decisive control of an arrest situation, even when the force used is reasonably related to legitimate police purposes and its use causes no physical injury to the arrestee. The opinion below subjects officers to unreasonable second-guessing by courts and juries because it fails to afford the police a zone of protection in making the difficult, on-the-spot decisions required in their discharge of their official duties. Such second-guessing interferes with police effectiveness and will inevitably expose officers and the public to increased danger in a variety of situations.

These issues are of vital interest to the FOP and its membership. The FOP represents and promotes the interests of law enforcement officers throughout the United States. Membership in local FOP Lodges affiliated with the Grand

1. Counsel for the FOP are the sole authors of this brief and no person or entity other than the FOP made any financial contribution to the preparation and submission of this brief. The consents of the parties are being lodged herewith.

Lodge is limited to full-time law enforcement officers who support and defend the Constitution of the United States. The efforts of the FOP to promote the interests of its members have included, over the years, collective bargaining, provision of representation in contested legal matters, and advocacy of the interests of its membership before Congress and in the federal courts. In the past five years, the Grand Lodge and its licensed Lodges have negotiated with government employers on behalf of over 250,000 law enforcement officers. The Grand Lodge has participated as amicus in a number of federal cases, including cases before the Supreme Court. *See County of Sacramento v. Lewis*, 523 U.S. 833 (1998).

STATEMENT OF THE CASE

The Ninth Circuit held in *Katz v. Saucier*, 194 F.3d 962 (9th Cir. 1999), that petitioner, a military police officer, was not entitled to qualified immunity against a *Bivins* damage claim of excessive force in effecting the arrest of respondent, an animal rights activist. (*See* Appendix A to Petition, at 16a.) The trial court had ruled the decision to arrest respondent for defying a ban against protesting on the Presidio Army base was supported by probable cause. (Appendix B, at 23a.) The claim at issue was whether the force used to make an otherwise lawful arrest was excessive. It appears beyond serious dispute that petitioner used minimal force in making the arrest and that respondent suffered no injury.

Respondent entered the base planning to protest at a public speech by Vice President Gore. Petitioner had received instructions to keep an eye on respondent. Petitioner also was instructed that "demonstrations would not be allowed," and to "diffuse the situation if it arises," but not to "draw

that much attention if we didn't have to." (Appendix A at 3a.) During the speech, respondent left his seat, walked to a railing separating the audience from the speaker's, pulled a banner from underneath his jacket, and attempted to unfurl the banner. Respondent claims petitioner and another officer grabbed him from behind, and the banner was torn from his hands.

At that point, respondent stated in his deposition, the officers "sort of started sort of pick[ed] me up and kind of walk[ed] me out, kind of like very hurriedly, sort of like the bum's rush: Let's just get this guy out of here." Respondent was taken about fifty yards to a van. Respondent testified he was "shoved" into the van and stated:

> I was — my head was going to smash down, or I was going to go full length into — with my head going into the end of the van, and I was able to stop the downward and the forward motion by just catching myself so that I didn't smash myself.

(Appendix B at 24a-25a.)

There is conflicting evidence regarding whether respondent resisted arrest. However, it appears undisputed that respondent, who was sixty-years old at the time, managed to avoid any injury during his arrest, even though he already had a broken foot in a brace.

SUMMARY OF THE ARGUMENT

In *Anderson v. Crieghton*, 483 U.S. 635, 644 (1987), this Court held that the issue of whether a police officer has committed an objectively reasonable mistake for qualified

immunity purposes is not identical to the substantive issue of lawfulness *vel non* under the Fourth Amendment, despite the fact that the Fourth Amendment is couched in terms of a series of prohibitions against "unreasonable" government conduct.

Two years later, in *Graham v. Connor*, 490 U.S. 386 (1989), the Court held that the test for excessive force in a Fourth Amendment case is whether the decision to use force to effect an arrest or seizure was objectively "reasonable." This question, the Court held, must be answered from the perspective of the police officer faced with the recurring, immediate, and often critical decisions of whether to use force, when to use force, and how much force to use. The Court specifically did not address how the "objectively reasonable" standard articulated with its qualified immunity analysis in *Anderson*. 490 U.S. at 399, n.12.

In the present case, the Court granted certiorari to resolve a split of authority among the lower courts on that very issue: Does *Graham*, in contrast to other areas of Fourth Amendment law, already fully incorporate the objective good faith concepts central to a qualified immunity analysis into its substantive analysis of lawfulness so that the two issues are really the same? Or is it still meaningful to speak of a police officer as having made a "reasonable mistake" about the amount of force that was legally permitted in a particular situation? *See* Petition at I (question 1 presented).

Amicus supports the arguments made by petitioner with respect to this issue. However, *amicus* also respectfully submits that whichever way the Court ultimately resolves this issue the Ninth Circuit got the qualified immunity question wrong. *See id.* (question 2). Were it accepted for

the sake of argument that the same concepts animate both an excessive force analysis and a qualified immunity analysis, this would imply that a broad range of conduct would be found reasonable under the Fourth Amendment, not that a narrow range of conduct would give rise to qualified immunity.

The Ninth Circuit's opinion is wrong because makes a very narrow range of conduct legally safe for an officer in conducting an arrest. Police officers are authorized to use reasonable force to make a lawful arrest. However, the opinion below precludes an officer from acting decisively to take control of an arrest situation with even minimal force, even when the arrest was otherwise lawful, the force used was reasonably related to legitimate police purposes, and there was no injury to the arrestee.

This ruling subjects law enforcement officers to all the dangers of post-hoc second-guessing against which this Court's cases warn. The court's opinion fails to give any deference to the practical exigencies that faced petitioner when he participated in respondent's arrest, and fails to consider key facts that supported the acts undertaken by petitioner.

ARGUMENT

I. THE NINTH CIRCUIT ERRED IN SUBSTITUTING ITS OPINION OF WHAT STEPS WERE NECESSARY TO SAFELY AND EFFECTIVELY ARREST RESPONDENT FOR AN ANALYSIS OF OBJECTIVE GOOD FAITH.

Petitioner was instructed to diffuse any confrontations with protesters as quickly as possible. This goal is consistent with legitimate concerns over maintaining public order. Consistent with his instructions, petitioner summarily escorted respondent to a police van where he was "shoved inside." Petitioner contends there were two alleged instances of force. The first, directly involving petitioner, consisted of "sort of picking [respondent] up and sort of walking [respondent] out," and the second, not directly involving petitioner, consisted of "shoving" respondent in the van. *See* Petition at 27-28. Respondent is an elderly gentleman and had a pre-existing broken foot at the time of his arrest. Nonetheless, he was not injured during the arrest. Judged against the substantial protection afforded police officers about the force necessary to make an arrest, and given the circumstances of this case, neither instance of force (even if both involved petitioner) was so clearly excessive that it defeats qualified immunity.

The Ninth Circuit used the wrong legal standard in analyzing the qualified immunity issue. It held petitioner was entitled to summary judgment if the evidence "compelled" the conclusion that the force used was reasonable. 194 F.3d at 970, n.5. Under this Court's cases, respondent only could defeat summary judgment if the evidence (viewed in the light most favorable to his claims) legally compelled the

conclusion that the force used was ***unreasonable***. Here, viewing the evidence in the light most favorable to respondent's claims, competent police officers could disagree whether the force used was reasonable under the circumstances.

In *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), the Court held "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." The doctrine of qualified immunity, the Court wrote, is necessary to balance competing polices:

> Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action. But where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken "with independence and without fear of consequences."

Id. at 819 (quoting *Pierson v. Ray*, 386 U.S. 547, 554 (1967)).

In *Anderson*, this Court held objective good faith on the part of police officers in making determinations of probable cause and exigent circumstances gives rise to qualified immunity. 483 U.S. at 640. In its opinion, the Court expressed the principle of objective good faith in the following terms:

> We have frequently observed, and our many cases on the point amply demonstrate, the difficulty of determining whether particular searches or seizures comport with the Fourth Amendment. *See, e.g. Malley* [*v. Briggs*, 475 U.S. 335, 341 (1986)]. Law enforcement officers whose judgments in making these difficult determinations are objectively legally reasonable should no more be held personally liable in damages than should officials making analogous determinations in other areas of law.

Id; *see also Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (qualified immunity helps ensure police officers will not "err always on the side of caution because they fear being sued").

In *Malley*, 475 U.S. at 341, *cited in Anderson*, 483 U.S. at 640, the Court had made it clear that objective good faith will bar a claim for damages against a police officer unless the conduct is obviously unlawful, holding officers "will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue; but *if officers of reasonable competence could disagree on this issue, immunity should be recognized*." (Emphasis added).

Under this Court's cases, qualified immunity extends to a Fourth Amendment claim unless there is no room for disagreement among reasonable police officers regarding the legality of the conduct at issue. This formulation is echoed in the opinions of many lower courts. *Thomas v. Roach*, 165 F.3d 137 (2d Cir. 1999), for example, held that objective good faith is met, and a police officer is entitled to qualified

immunity, if officers of reasonable competence could disagree on the legality of the officer's actions. Similarly, in *Roy v. Inhabitants of the City of Lewiston*, 42 F.3d 691 (1st Cir. 1994), the court noted:

> [W]hether substantive liability or qualified immunity is at issue, the Supreme Court intends to surround the police who make these on-the-spot choices in dangerous situations with a fairly wide zone of protection in close cases. Decisions from this circuit and other circuits are consistent with that view. And in close cases, a jury does not automatically get to second-guess these life and death decisions, even though the plaintiff has an expert and a plausible claim that the situation could better have been handled differently.

42 F.3d at 695 (footnote omitted, citing *Gaudreault v. Municipality of Salem, Mass.*, 923 F.2d 203 (1st Cir. 1990), *cert. denied*, 500 U.S. 956, 111 S. Ct. 2266, 114 L. Ed. 2d 718 (1991); *Krueger v. Fuhr*, 991 F.2d 435 (8th Cir.), *cert. denied*, 510 U.S. 946, 114 S. Ct. 386, 126 L. Ed. 2d 335 (1993); *Reese v. Anderson*, 926 F.2d 494 (5th Cir. 1991); *Ryder v. City of Topeka*, 814 F.2d 1412 (10th Cir. 1987)). *See also Frazell v. Flanigan*, 102 F.3d 877 (7th Cir. 1996) (reasonableness must not be addressed with "20/20" hindsight); *Gold v. City of Miami*, 121 F.3d 1442, 1446 (11th Cir. 1997) (qualified immunity appropriate unless circumstances would inevitably lead a reasonable officer in the defendant's position to conclude that force used was unlawful), *cert. denied*, 525 U.S. 870 (1998).

Summary judgment of course requires the evidence to be examined in the light most favorable to respondent's

claims. Nonetheless, summary judgment should have been granted unless the evidence supporting respondent's claims affirmatively showed the force used was objectively unreasonable. If reasonably competent police officers could disagree about whether the alleged use of force was justified, petitioner was entitled to qualified immunity. *Malley.*

II. AS A MATTER OF FOURTH AMENDMENT LAW, A SUBSTANTIAL NUMBER OF LOWER COURTS WOULD HOLD THAT USE OF MINIMAL FORCE TO MAKE AN OTHERWISE LAWFUL ARREST AND RESULTS IN NO INJURY DOES NOT VIOLATE THE CONSTITUTION; THEREFORE, A REASONABLE POLICE OFFICER COULD HAVE CONCLUDED PETITIONER'S CONDUCT WAS LAWFUL.

A. The Ninth Circuit's analysis of the underlying Fourth Amendment violation failed to consider important and relevant factors and failed to consider the circumstances from the perspective of petitioner.

In analyzing the force used to arrest respondent, the opinion below considers only three factors: "(1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and (3) whether the suspect actively resists detention or attempts to escape." 194 F.3d at 970. The opinion itself earlier acknowledges this list, drawn from *Graham v. Connor*, 490 U.S. at 396, is "non-exhaustive." *Id.* at 967. Having thus narrowed its perspective, the opinion compounds the error by freely substituting the court's perceptions of the circumstances surrounding respondent's arrest for those of petitioner:

> Taking these facts as true for the purpose of summary judgment, no reasonable officer could have believed that the alleged amount of force used to arrest Katz was necessary under the circumstances. Unfurling a banner at a public event does not appear to be a particularly severe crime. Katz was sixty years old and wearing a leg brace. There is no indication that he was armed or dangerous. From all that appears at this stage of the case, he did not pose an immediate threat to the safety of the officers or anyone else. Although Saucier disputes whether Katz resisted arrest, Katz says he did not.

194 F.3d at 970 (citation omitted).

Nowhere does the opinion consider the circumstances surrounding respondent's arrest from the perspective of petitioner, who had been reasonably instructed to diffuse any situation quickly and with a minimum of attention, and who had no way of knowing whether other demonstrators were present and might create a disturbance at the arrest of respondent. Nowhere does the opinion take into consideration the fact that the force used allowed petitioner to take decisive control of an arrest situation and resulted in no physical injury to respondent. Petitioner conducted a lawful arrest by reasonable and effective means and should not be hailed into federal court for his actions.

As a matter of substantive Fourth Amendment analysis, the opinion below fails to adequately address the "totality of circumstances" of this case. *See Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985). Its restrictive analysis also fails to adequately balance "the nature and quality of the intrusion

on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." *Graham v. Connor*, 490 U.S. at 396 (quoting *Tennessee v. Garner*, 471 U.S. at 8.).

Additionally, the opinion's authoritative statements regarding the reasonableness of force failed to allow "for the fact that police officers are often forced to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving — about the amount of force that is necessary in a particular situation." *Id.*, 490 U.S. at 397. *See also Smith v. Freland*, 954 F.2d 343, 347 (6th Cir. 1992) ("[U]nder *Graham*, we must avoid substituting our personal notions of proper police procedure for the instantaneous decision of the officer at the scene. We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day.").

The result is disturbing. It goes too far towards making "every push or shove," if it later is made to seem "unnecessary in the peace of a judge's chambers" into a constitutional violation for which there is no qualified immunity. *Johnson v. Glick*, 481 F.2d at 1033, *quoted in Graham*, 490 U.S. at 397. If police officers hesitate to handle an arrest situation decisively out of fear of facing litigation, even when their conduct is reasonably related to legitimate law enforcement goals and causes no harm, they ultimately undermine their own effectiveness and may endanger themselves, their colleagues, and the public at large. These are precisely the dangers that the qualified immunity doctrine, *see Malley*; *Hunter,* and the limitations on excessive-force liability, *see Graham*, are meant to prevent.

B. The opinion below fails to consider factors considered relevant in a Fourth Amendment context by a substantial number of lower courts.

A substantial number of lower courts have concluded that instances of minimal force that do not result in actual or significant injury do not state a Fourth Amendment excessive force violation. In *Foster v. Metropolitan Airport Comm'n*, 914 F.2d 1076 (8th Cir. 1990), the Eighth Circuit held that the officers' use of force after they successfully pulled the plaintiff from the car did not to give rise to a constitutional claim of excessive force under the fourth amendment, even though the plaintiff testified that he was pushed against a wall twice on the way to the holding area, given his further testimony that he sustained no injury as a result of being pushed. Similarly, in *Randles v. Gregart*, 965 F.2d 90 (6th Cir. 1992), the Sixth Circuit held that the modest force exerted, which resulted in no injury, was objectively reasonable. In that case plaintiff had refused to give deputies his gun, which he was using to hunt illegally on his property.

Lack of injury may be an important fact even when deadly force is threatened. In *Sharrar v. Felsing*, 128 F.3d 810, 821 (3d Cir. 1997), police officers required the arrestees to lie face down in the dirt, with guns to their head, and made threats. The Court held that even though these actions caused discomfort and humiliation, they were still objectively reasonable. *Id. See also Wilson v. Williams*, 83 F.3d 870 (7th Cir. 1996) (in due process case, proper for jury to

consider extent of injury, need to apply force, relationship between force used and need for force, threat reasonably perceived by official, and efforts made to temper severity of a forceful response); *Lester v. Chicago*, 830 F.2d 706, 714 (7th Cir. 1987) (pre-Graham case holding that plaintiff stated trial-worthy Fourth Amendment "excessive force" claim when, during course of arrest for disturbing peace, plaintiff was kneed in the back, threatened with being struck, dragged down a hallway, and handcuffed tightly, causing bruises on her wrists); *Azeem v. Town of Bethel*, 2000 WL 1838329 (D. Conn., Sept. 27, 2000) (recognizing the importance of some injury to arrestee in an excessive force case).

While most courts recognize the relevance of the amount of force used and degree of injury, the Eleventh Circuit has adopted a *per se* rule that application of de minimis force, without more, will not support a claim for excessive force in violation of the Fourth Amendment. *See Nolan v. Isbell*, 207 F.3d 1253 (11th Cir. 2000).

The Fifth Circuit requires a plaintiff asserting an excessive force claim to have "suffered at least some form of injury," *Jackson v. R.E. Culbertson*, 984 F.2d 699, 700 (5th Cir. 1993), even though that court acknowledges its "significant injury" standard was abrogated by *Hudson v. McMillian*, 503 U.S. 1, 8, 112 S. Ct. 995, 117 L. Ed. 2d 156 (1992), an Eighth Amendment case. "[T]he amount of injury necessary to satisfy our requirement of 'some injury' and establish a constitutional violation is directly related to the amount of force that is constitutionally permissible under the circumstances." *Ikerd v. Blair*, 101 F.3d 430, 434 (5th Cir. 1996).

Katz cites to an Eleventh Circuit case, *Sheth v. Webster*, 145 F.3d 1231, 1238 (11th Cir. 1998) for support. *See* 194 F.3d at 970. However, in *Sheth* the decision to arrest

itself was unlawful and the court found a triable claim under the following record:

> Officer Webster became enraged and violent. He shoved the plaintiff, who stumbled. He pushed again. The plaintiff cried to Webster that he was hurting her. He threw her back again. According to one witness, he kneed the plaintiff in the stomach. Sheth fell back against a Coke machine, five to twelve feet from where she stood. Webster grabbed Sheth's arm and squeezed it. People around began to shout at Webster to stop, that he was hurting her. At least one witness told Webster that the plaintiff was sick. He twisted her arm around her back and locked handcuffs on her left wrist. Webster then dragged the plaintiff by the arm to his car. She "begged Officer Webster not to arrest her and place her in the car." She told him that she was claustrophobic and taking medication for an illness. Apparently, this was of no avail. . . .

145 F.3d at 1234.

Both *Sheth* and *Alexis v. McDonald's Restaurants of Massachusetts, Inc.*, 67 F.3d 341, 353 (1st Cir. 1995), *cited by Katz*, 194 F.3d at 970, involved an illegal arrest. In *Alexis*, the decision to arrest the plaintiff itself exposed the officer to liability under 42 U.S.C. § 1981, and the court found a triable issue of excessive force based on the following record:

> Leporati suddenly and violently grabbed and pulled [plaintiff] bodily from the booth and across the table, handcuffed her hands tightly behind her

> back, and, with the help of Officer Fuer, dragged her from the booth, bruising her legs in the process. Insisting that she was "not resisting arrest," Alexis asked the officers to allow her to walk out. Instead, they hoisted her by her elbows and carried her from the restaurant to the police car, where Leporati pushed her into the car with the instruction, "Get your ass in there."

67 F.3d at 346.

This case is like neither *Sheth* nor *Alexis*. Here petitioner was conducting an arrest supported by probable cause, his conduct was reasonably related to the legitimate goal of minimizing disruption to a public event, and he did not act with clearly unnecessary violence.

C. Minimal use of force that is reasonably related to the legitimate purpose of making a lawful arrest and results in no physical injury should seldom, if ever, result in a Fourth Amendment violation.

The Fourth Amendment inquiry into whether a police officer used unreasonable force to effect an arrest or seizure necessarily involves considerations that overlap with the Eighth Amendment inquiry into whether "force was applied in a good faith effort to maintain or restore [prison] discipline or maliciously and sadistically for the very purpose of causing harm." *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986) (quoting *Johnson v. Glick*, 481 F.2d at 1033). In both situations, government officials are authorized and often called upon to employ force: in the Fourth Amendment context, to make an arrest or seizure; in the Eighth, to administer a constitutionally acceptable regimen

of punishment. In both instances, moreover, the existence of actual or significant physical injury is often highly relevant to the question of " 'whether the use of force could plausibly have been thought necessary' in a particular situation." *Hudson v. McMillian*, 503 U.S. 1, 7 (1992) (quoting *Whitely*, 475 U.S. at 321).

The continued relevance of the existence of injury to Fourth Amendment excessive force cases, and the reliance of many courts on this Court's Eighth Amendment opinion in *Hudson,* thus comes as no surprise. Historically, the law of excessive force, as expressed both in the opinions of this Court and the lower courts, has drawn consistently from *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir.), *cert. denied sub nom. John v. Johnson*, 414 U.S. 1033, 94 S. Ct. 462, 38 L. Ed. 2d 324 (1973), which listed the extent of injury as one of its factors.[2] As noted in *Graham*, the

> vast majority of lower federal courts [had] applied [*Johnson v. Glick's*] four-part "substantive due process" test indiscriminately to all excessive force claims lodged against law enforcement and prison officials under § 1983, without considering whether the particular application of force might implicate a more specific constitutional right governed by a different standard.

490 U.S. at 393.

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2. The four factors are: (1) the need for the application of force; (2) the relationship between that need and the amount of force that was used; (3) the extent of the injury inflicted; and (4) whether the force was applied in a good faith effort to maintain and restore discipline or maliciously and sadistically for the very purpose of causing harm.

While *Graham* rejected *Johnson v. Glick*'s focus on the intent of the officer as inappropriate to a Fourth Amendment analysis, and adopted a totality of the circumstances test instead, there is nothing in *Graham* suggesting that the remaining three factors are not relevant and important considerations in judging the ultimate question of objective reasonableness. Indeed, the relevance of injury to the issue of excessive force is at least implicit in the Court's statement that "the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." 490 U.S. at 396.

A set amount of physical harm may not be required *per se* to state a Fourth Amendment violation any more than an Eighth Amendment violation. *See Hudson*, 503 U.S. at 7 (The absence of serious injury is . . . relevant to the Eighth Amendment inquiry, but does not end it"). However, when, as here, minimal force is used simply to make an otherwise lawful arrest, and this force results in no physical injury, a conclusion that excessive force was used should seldom, if ever, follow. *Cf. Hudson*, 503 U.S. at 9-10 ("The Eighth Amendment's prohibition of "cruel and unusual punishments necessarily excludes from constitutional recognition de minimis uses of physical force, provided that the use of force is not of a sort 'repugnant to the conscience of mankind.' " (citation omitted)).

D. At a minimum, the cases holding that no Fourth Amendment violation arises from minimal force that causes no physical injury imply that reasonable minds could differ regarding whether the force used by petitioner was unreasonable, and the court below erred in denying summary judgment on qualified immunity.

This Court has yet to speak definitively on the application of *Hudson* in a Fourth Amendment context. *Amicus* respectfully submits that the existence of some actual injury and the use of more than minimal force are equally important considerations in an arrest situation as in a prison case. From the perspective of police officers, it is critical that they be allowed to preserve the ability to act decisively and take control of an arrest situation using at least the level of force present in this case without having to fear civil liability, especially when their conduct results in no physical harm. It is respectfully submitted that in the long run a rule that preserves this ability best serves the public interest without unduly intruding upon individual interests protected by the Fourth Amendment.

However, even were the Court ultimately to disagree and hold the substantive law on this issue is other than the cases cited above suppose, for now it is clear that reasonably competent police officers could differ on the issue. "If judges . . . disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Wilson v. Layne*, 526 U.S. 603, 618 (1999). At the time of respondent's arrest it cannot be said that a reasonably competent police officer would have concluded that petitioner's use of force was clearly excessive. The opinion below errs in reaching the opposite conclusion.

CONCLUSION

Qualified immunity serves the critically important function for law enforcement of allowing officers to act in reasonable good faith without having to worry that courts latter will dissect decisions made in the pressures and uncertainties of the moment and conclude that there was a better course of action than the one chosen. A police officer's effective and safe discharge of his or her duties often depends on the ability to take reasonable steps to exert control of an arrest situation "with independence and without fear of consequences." *Harlow*, 457 U.S. at 819.

The opinion below undermines the doctrine of qualified immunity by holding petitioner acted in an objectively unreasonable fashion when he used minimal force to make an arrest that caused no physical harm to respondent. This transforms the broad limits of objective good faith contemplated by the qualified immunity doctrine into a straightjacket on police decisions, and the Fourth Amendment's prohibitions against excessive force into a prohibition on the use of force at all in many situations. *Amicus* respectfully submits the opinion below is wrongly decided, and the Court should reverse.

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JAN 8 2001 (6)
Supreme Court, U.S.
FILED
JAN 8 2001

No. 99-~~1997~~ 1977

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1999

DONALD SAUCIER,

Petitioner,

v.

ELLIOT M. KATZ and
IN DEFENSE OF ANIMALS

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS and NATIONAL LAW ENFORCEMENT OFFICERS' RIGHTS CENTER, IN SUPPORT OF THE PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, in a case alleging the use of constitutionally excessive force, the test for qualified immunity and the reasonableness test under the Fourth Amendment are identical, such that a finding of unreasonable force under the Fourth Amendment necessarily precludes the officer from being entitled to qualified immunity.

2. Whether the court of appeals erred in concluding, based on the facts known to it "at this stage of the case," that petitioner's use of force in arresting respondent, which consisted of carrying respondent from the crowd to a waiting van and pushing him inside, without injuring him or placing him in any pain, so clearly exceeded the amount of force permitted by the Fourth Amendment as to warrant denial of qualified immunity.

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A. The decision below effectively precludes the availability of qualified immunity in most excessive force cases against law enforcement officers has potentially serious consequences for public safety. The ruling below places officers at risk of undue interference in the performance of their duties through having to defend increasing numbers of lawsuits and potentially disabling liability. It also directly impacts public safety, as officers become reluctant to use any force while restraining, arresting, or frisking an individual, for fear of being sued for any force that they use..... 7

B. The Ninth Circuit's ruling would make the determination of qualified immunity in excessive force cases rest on the jury's or judge's eventual decision on the issue of liability in lawsuits alleging unconstitutionally excessive use of force, thus

combining these two issues. This combination creates a major exception for the application of qualified immunity in many, if not all, excessive force lawsuits against law enforcement officers. Such an exception for excessive force cases negates and defeats one of the important policy reasons underpinning qualified immunity, an entitlement not to stand trial and a defense against lawsuit and contradicts *Anderson's* expressed rejection of such exceptions..... 13

II. The "objective reasonableness" component of the judicial inquiry as to the lawfulness of an officer's conduct under the Fourth Amendment, is not the same as the objective "reasonableness-of-officer's-belief" component of the inquiry as to the officer's qualified immunity. If both were the same, the consequence would be that qualified immunity would rarely be applicable in excessive force cases but would instead become a futile and unavailing doctrine..... 17

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae National Association of Police Organizations, Inc. (hereafter "NAPO") and its affiliate, the National Law Enforcement Officers' Rights Center of the Police Research and Education Project, submits this brief in support of Petitioner, Donald Saucier, a military police officer with the United States Army at the time of the incident.[1] NAPO seeks to reverse the judgment of the Ninth Circuit Court of Appeals, denying the Petitioner's motion for summary judgment on qualified immunity.

NAPO is a national non-profit organization, representing law enforcement officers throughout the United States. It is a coalition of police associations and unions that serves to advance the interests and legal rights of officers through advocacy, legislation, and education, representing 4,000 law enforcement organizations with over 228,000 sworn law enforcement officers (including police officers, deputy sheriffs, state troopers or highway patrol officers, and some federal agents) and 11,000 retired officers. NAPO's affiliate, the National Law Enforcement Officers' Rights Center, advocates the fundamental due process and workplace rights of officers.

NAPO's members have a significant interest in the important issues of law before this Court. The Court's decision will directly impact law enforcement officers employed by all levels of government. If the lower court's decision in this case is not reversed, officers will become more reluctant to use any force in performing their duties, even if such force appears necessary and lawful to make an arrest or to restrain or remove a suspect. This is because officers will justifiably fear that the use of any force could very well subject them to protracted litigation.

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party in this case authored this *amicus curiae* brief in whole or in part, and no person or entity, other than the *amicus curiae* and its members, made a monetary contribution to the preparation or submission of the brief. In addition, both the Petitioner and the Respondent have consented to this brief, and copies of the consents have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3(a).

Basic legal research reveals an ever increasing number of lawsuits against law enforcement officers; the number of recent appellate decisions in § 1983 cases continues to grow and will become staggering. It is no secret that a 'cottage industry' of attorneys has developed to sue police officers. This 'industry's' primary purpose is to find clients with a grievance against the police because of alleged mistreatment and then to bring a lawsuit alleging constitutional violations for the purpose of winning a substantial sum.[2] While that phenomenon is obviously the American way and while some cases may indeed merit a finding of liability and monetary damages, it is no secret that the goal in filing many of the cases is to obtain a significant pre-trial settlement, which state or local governments are often willing to make for financial or publicity reasons.[3] Affirming the Ninth Circuit's decision in this case would provide an added incentive to file more lawsuits against officers and their agencies, subjecting them to lengthy discovery and trials.

There is a context for this fear. Officers have been increasingly under siege by management in some departments, which have been increasingly willing to promote officers who are more aggressive in solving crimes or preventing crime–at times without providing for adequate training on the use of force–or, on the other hand, to take personnel or even disciplinary actions against officers if they are not viewed as being sufficiently aggressive in cracking down on crime. In addition, officers routinely fear for their continued careers, their physical and emotional health and that of their families, and even sometimes their financial solvency (if not fully indemnified and there is the

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[2] Some of these attorneys are well-known and tend to turn up soon after a highly visible incident where a suspect has been injured or killed. A few are experts, who have written treatises on the subject, who commercially report cases on police misconduct, or who make oral presentations, including running seminars on the subject. Some of these attorneys can be identified through an Internet search. In fact, a Chicago attorney has written a "how to" plead and litigate police misconduct cases, placing this information on his web site.

[3] Often, a municipal or county government does not have the resources to fully litigate and then risk losing a significant judgment, which it would be hard-pressed to pay. Or it wants to put a highly-publicized incident, perhaps with racial overtones, to rest, notwithstanding a strong defense.

possibility of punitive damages) when named as defendants in lawsuits alleging constitutional violations. It is no wonder that police departments are having difficulty recruiting officers, with poor morale being the biggest obstacle to retaining current officers and a major factor in recruiting new ones.[4]

Amicus curiae welcomes this opportunity for the U.S. Supreme Court to clarify an important doctrine, which has been unjustifiably constricted by the Ninth Circuit and by several other circuits. The Court's resolution of this case will determine, first, whether qualified immunity for officers and other public employees remains a viable doctrine serving important public policies and, second, whether the courts should routinely deny summary judgment for the officer and reject qualified immunity for an officer who used absolutely minimal force in making an arrest resulting in no injury, as a matter of law, in disregard of the principles established by this Court's prior decisions.

SUMMARY STATEMENT OF THE CASE

The *amicus curiae* adopts and relies upon the factual statement in the June 8, 2000 Petition for a writ of certiorari, filed in this appeal by the Solicitor General of the United States. What follows is a shorter narrative of that statement.

Respondent Katz's Fourth Amendment excessive force claim arose out of his arrest at the Presidio military post in San Francisco, during a September 1994 event held to celebrate conversion of the Presidio to a National Park, during which senior officials spoke. Although display of political banners on military bases is prohibited, Katz stood up during Vice President Gore's speech, walked to a barrier separating these officials from the audience, and then unfurled a large banner, which read: "Please Keep Animal Torture Out of Our National Parks", a protest against alleged animal experimentation at the Army's hospital located within the Presidio.

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[4] *See* Robert T. Scully, Letter to the Editor, *Cop shortage is no surprise*, USA Today, Dec. 1, 2000, at 27A.

Just after unfurling the banner, Petitioner Donald Saucier and Sergeant Steven Parker, both military policemen, approached Katz quickly. These officers each took one of Respondent's arms and quickly removed him from the seating area. According to Katz (during discovery), they "started sort of picking me up and kind of walking me out, kind of like very hurriedly." Respondent claims that he was then "shoved" into a military police van located nearby. While Respondent claims that he nearly fell headlong into the van and was almost injured, he admits that he was not injured, because he caught himself in time. After a brief detention at a military police station, Respondent was released. Respondent's arrest was broadcast, and a videotape of the relevant portion was submitted to the district court. Viewed in a light most favorable to Katz, the videotape confirms the Katz's removal and his movement towards the van.

Respondent brought this action against Petitioner and other officials under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), alleging that the officers used unconstitutionally excessive force to arrest him[5] In denying the Petitioner's motion for summary judgment, the district court ruled that there were disputed questions of fact relevant to the constitutional claim and the qualified immunity defense. The district court held,"[T]he qualified immunity inquiry is the same as the inquiry made on the merits."[6] The Ninth Circuit affirmed. *Katz v. United States, et al.*, 194 F.3d 962 (1999). It held that the reasonableness standard to determine the merits of Katz's excessive force claim was identical to the reasonableness test for the officer's qualified immunity defense, thereby precluding summary judgment on that issue. In addition, in response to Petitioner's argument that the "amount of force he used in arresting Katz was so minimal that it was per se reasonable" to grant him qualified immunity, the Ninth Circuit

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[5] The outcome of this case, while brought under Bivens, will also directly affect lawsuits brought under 42 U.S.C. § 1983 against state, municipal, and county law enforcement officers, because the defense of qualified immunity may be invoked, irrespective of the jurisdictional basis. *See Butz v. Economou*, 438 U.S. 478, 504 (1978).

[6] Petition for a writ of cert., *Saucier v. Katz et al.* at 30a.

also ruled that, "taking the facts as asserted by Katz in the light most favorable to him, no reasonable officer could have believed that the amount of force used was lawful." *Id.* at 968-70.

SUMMARY OF THE ARGUMENT

Qualified immunity protects law enforcement officers and other public officials from the expense and vexation of protracted litigation, possible damages, and from the chilling effect that potential litigation has upon the exercise of their responsibilities. Officers are routinely placed in situations where they may be called upon to use some force, from the minimal force used in this case to effect an arrest, to deadly force during dangerous situations where officers must draw their guns and prepare to use them in self-defense or the defense of others. The fear of personal liability can seriously erode this necessary confidence and willingness to act. An officer's hesitation to use force for fear of being sued endangers not only his or her life, but the lives of other citizens, and would allow public disturbances to escalate, as could have happened here. In diligently pursuing their duties in good faith, officers should not have to fear harassing litigation or paying potential monetary damages, whenever they use any force which they reasonably believe to be lawful under the Fourth Amendment, even minimal force. Qualified immunity is a governmental policy which serves this public interest.

The Ninth's Circuit's decision violates this Court's holding in *Anderson v. Creighton*, *infra*, and is unsupported in law. The "objective reasonableness" component of the judicial inquiry as to the lawfulness of an officer's conduct under the Fourth Amendment, is not the same as the objective "reasonableness-of-officer's-belief" component of the inquiry as to the officer's qualified immunity. The use of the word 'reasonable' or 'reasonableness' does not convert the qualified immunity and liability standards into an identical one. Combining the two separate "reasonableness" standards into one inquiry cases place the question of immunity in the hands of the jury in the vast majority of excessive force cases where there is some material factual dispute, no matter how minor or how irrelevant that that dispute is to the determination of qualified immunity—the

situation in this case. Thus, qualified immunity would no longer be available as a defense in most excessive force cases and the determination thereon will depend on and probably parallel the determination of liability after a trial.

Therefore, a law enforcement officer, who may have violated or did violate the plaintiff's constitutional rights by using excessive force, would no longer be entitled to qualified immunity, even if the officer reasonably believed his or her actions were lawful and justified, even if mistaken. As a consequence, qualified immunity would rarely be applicable in many or most excessive force cases but would instead become a futile and unavailing doctrine. By effectively precluding findings of qualified immunity, especially through summary judgment, in all but the most obviously frivolous cases, the Ninth's Circuit's decision circumvents and thwarts the important public interests served by qualified immunity

Here, qualified immunity would entitle the Petitioner to summary judgment if, in light of clearly established principles governing the use of force, he or other military police officers could have reasonably believed that his specific actions in arresting the Respondent, quickly removing him from the ceremony, and placing him in a van out of sight, were lawful, in light of the information possessed by the Petitioner at the time. In this case, failing to quickly remove the Respondent could have further disrupted the Presidio ceremony and encouraged others to register protests, as well as possibly increasing a security risk to the Vice President and other officials on podium.

In addition, the Eleventh, Fifth, Second, Fifth, Eight, and Eleventh Circuits apply the principle of de minimis or minimal use of force and grant qualified immunity to the defendant officers whenever the force used by a law enforcement officer was minimal (often irrespective of the issue of liability) and the injuries were minor or non-existent. Taking the Respondent's allegations as true in the instant case, the force involved in removing the Respondent and in placing him in the van was nominal and minimal, as supported by a lack of any injury. Also, the force used was of the type that police officers could reasonably

expect to use to remove an individual quickly from a crowd to prevent a public disturbance.

Under the minimal-use-of force standards established by the Second and Eleventh Circuits, qualified immunity should have been granted for the Petitioner by way of summary judgment. *First*, the circumstances would not 'inevitably lead' a reasonable officer in the Petitioner's position to conclude that the force used on the Respondent was unlawful, the Eleventh Circuit's test. *Second,* no rational jury could have found that the force used by Petitioner was so excessive that no reasonable officer would have made the same choice, the Second Circuit's standard.

ARGUMENT

I. The principle of qualified immunity serves important public policies when a law enforcement officer is sued for damages for alleged excessive use of force. The decision by the court of appeals equates immunity with liability, severely constrains the application of qualified immunity, and thus effectively constricts it so much that the immunity will rarely be available as a viable defense in excessive force cases. Therefore, the decision seriously undermines the public interest, with consequences for public safety.

This Court has repeatedly upheld the principle of qualified immunity for law enforcement officers and others officials and has affirmed the important public interests which the doctrine serves, including the resolution of this issue before trial, if at all possible. By effectively precluding qualified immunity in all but the most obviously frivolous cases, the circuit court's decision circumvents the important public policies served by qualified immunity.

A. The decision below effectively precludes the availability of qualified immunity in most excessive force cases against law enforce officers has potentially serious consequences for public safety. The ruling below places officers at risk of undue interference in the performance of their

duties through having to defend increasing numbers of lawsuits and potentially disabling liability. It also directly impacts public safety, as officers become reluctant to use any force while restraining, arresting, or frisking an individual, for fear of being sued for any force that they use.

I

This Court has consistently held that "government officials are entitled to some form of immunity from suits for damages" in order to protect them from "undue interference with their duties and from potentially disabling threats of liability." *Harlow v. Fitzgerald,* 457 U.S. 800, 806 (1982). Perhaps the best exposition on this public policy is *Forrester v. White*, 484 U.S. 219 (1988):

> By its very nature, however, the threat of liability can create perverse incentives that operate to inhibit officials in the proper performance of their duties. In many contexts, government officials are expected to make decisions that ... above all are informed by considerations other than the personal interests of the decisionmaker. Because government officials are engaged ...in governing, their decisions will often have adverse effects on other persons. When officials are threatened with personal liability for acts taken pursuant to their official duties, they may well be induced to act with an excess of caution or otherwise skew their decisions in ways that result in less than full fidelity to the objective and independent criteria that ought to guide their conduct. In this way, exposing government officials to the same legal hazards faced by other citizens may detract from the rule of law instead of contributing to it.

Id. at 223.[7] *Harlow* addressed the social costs involved:

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[7] *See Scheuer v. Rhodes*, 416 U.S. 232 (1974) where the Court emphasized that public officials, including the police, "who fail to make decisions when they are needed or who do not act to implement decisions when they are made do not fully and faithfully perform the duties of their offices. ... [I]t is better to risk

> [I]t cannot be disputed seriously that claims frequently run against the innocent as well as the guilty—at a cost not only to the defendant officials, but to society as a whole. (footnote omitted) These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the ... discharge of their duties.

457 U.S. at 814 (citing *Gregoire v. Biddle*, 177 F.2d 579, cert. denied, 339 U.S. 949, 70 S.Ct. 803 (1950)). *See Anderson v. Creighton*, 483 U.S. 635 (1987) and *Davis v. Scherer*, 468 U.S. 183, 196 (1989).[8]

II

Two subsequent Supreme Court cases explain how qualified immunity serves the public purpose. *Mitchell v. Forsyth*, 472 U.S. 511 (1985), discussed the importance of resolving the issue of immunity before trial, if at all possible. The Court emphasized the distinct differences between the issues of immunity and liability:

> Harlow thus recognized an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question ... . The entitlement is an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial. ...
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> Similarly, it follows from the recognition that

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some error and possible injury from such error than not to decide or act at all. *Id.* at 241-242.

[8] "The fear associated with allowing damages suits against government officials entails substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." 483 U.S. at 638."

> qualified immunity is in part an entitlement not to be forced to litigate the consequences of official conduct that a claim of immunity is conceptually distinct from the merits of the plaintiff's claim that his rights have been violated.

Ibid. at 526 and 527-28. *Harlowe* emphasized that "[u]ntil this threshold immunity question is resolved, discovery should not be allowed." 457 U.S. at 818. Subsequently, in *Siegert v. Gilley*, 111 S.Ct. 1789 (1991), this Court elaborated:

> Decision of this purely legal question permits courts expeditiously to weed out suits which fail the test without requiring a defendant who rightly claims qualified immunity to engage in expensive and time consuming preparation to defend the suit on its merits. One of the purposes of immunity, ... is to spare a defendant not only unwarranted liability, but unwarranted demands customarily placed upon those defending a long drawn out lawsuit.

Id. at 1793.

Shortly thereafter, in *Hunter v. Bryant*, 502 U.S. 224, 228 (1991), the Court reversed the Ninth Circuit, because, "[its decision] routinely places the question of immunity in the hands of the jury. Immunity ordinarily should be decided by the court long before trial. (citation omitted)." In the instant case, the consequence of the Ninth Circuit's decision to combine the two separate "reasonableness" standards into one inquiry will be the same as in *Hunter*, to once again place the question of immunity in the hands of the jury in the vast majority of cases where there is some material factual dispute, no matter how minor or how irrelevant that that dispute is to the determination of qualified immunity—the situation in this case.

III

Police officers need to be able to respond quickly and effectively when arresting, restraining, or using other force on a

suspect. Qualified immunity serves that public interest most directly by allowing police officers to do their job, permitting them some flexibility on the degree and range of physical force utilized in response to enforcing the law, including responses to unlawful public disturbances or inherent or perceived danger. As *Anderson* states, "Law enforcement officers whose judgments in making these difficult determinations are objectively legally reasonable should no more be held personally liable in damages than should officials making analogous determinations in other areas of law." 483 U.S. at 644. Qualified immunity facilitates this process and promotes effective law enforcement. As the Chief of the FBI Academy's Legal Instruction Unit has written:

> Law enforcement officers face many stressful situations inherent in their profession, including the threat of being sued ... because of their actions. Since officers are often placed in fast-breaking situations, they must decide whether to arrest or search with little opportunity to obtain prior legal advice. By its very nature, law enforcement inevitably places officers in situations where they must make difficult judgments, balancing the extent of the authority they exercise with the constitutional rights of the citizens they serve. ... [L]aw enforcement effectiveness often depends on officers' confidence and willingness to act swiftly and decisively to combat crime and protect the public.
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> However, the fear of personal liability can seriously erode this necessary confidence and willingness to act. Even worse, law enforcement officers who have an unrealistic or exaggerated fear of personal liability may become overly timid or indecisive and fail to arrest or search to the detriment of the public's interest in effective and aggressive law enforcement. ...
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> ...
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> An officer's discretionary decision to arrest or search inevitably increases the risk of a subsequent lawsuit. ... The qualified immunity defense does not excuse clearly unconstitutional or offensive police

> misconduct. It does, however, offer generous protection to conscientious officers who make objectively reasonable mistakes. The availability of a qualified immunity defense should be encouragement to responsible officers that they can perform their vital law enforcement functions with a constant fear of personal liability.

Daniel L. Schofield, *Personal Liability—The Qualified Immunity Defense*, FBI LAW ENFORCEMENT BULLETIN, March 1990 (Internet version contains no page numbers).

If an officer is fearful of lawsuits and liability and, as a result, reluctant to use the reasonable force believed by the officer to be lawfully necessary to arrest an individual for which there is probable cause, or even to apprehend an armed suspect, then the officer's hesitation endangers public safety. This reluctance not only increases the risk that an suspect may try to flee or not cooperate during an arrest, but also places the officer and the lives of nearby persons in potentially serious jeopardy especially when a suspect is armed and dangerous. In this case, failing to quickly remove the Respondent could have further disrupted the Presidio ceremony and encouraged others to register protests, as well as possibly increasing a security risk to the Vice President and other notables. Unfortunately, the Ninth Circuit panel in this case has treated lightly, if at all, the potential consequences of constricting the doctrine of qualified immunity.

While the instant case involves minimal force, *amicus curiae* respectfully asks the Supreme Court to remain cognizant that its holding will also affect the application of qualified immunity to officer use of deadly force in cases where the stakes are obviously much greater. The consequences could be deadly for an officer and bystanders if an officer believes that only a lesser use of force, than would normally be applied, will pass constitutional muster. The U.S. Constitution does not require that police officers use "a minimum of violence when attempting to stop a suspect from using deadly force against police officers or others." *O'Neal v. DeKalb County*, 667 F. Supp. 853, 858 (N.D. Ga. 1987). To do so would "expose police officers to unnecessary

risks." *Id.* The greater risk of injury or death which could emanate from a recognition that qualified immunity would not be available to officers in most excessive force cases, as could well occur if the Ninth Circuit's judgment is affirmed, is an unacceptable to law enforcement officers and their families.

Let there be no misunderstanding about it, significantly reducing the availability of qualified immunity before trial will place officers in varying degrees of greater jeopardy and will serve as a deterrent to some necessary use of force. It will thus increasingly expose police officers to unnecessary risks. As this Court stated in *Terry v. Ohio*, 392 U.S. 1, 23-24 (1968):

> [I]t would be unreasonable to require that police officers take unnecessary risks in the performance of their duties ... every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded. Virtually all of these deaths and a substantial portion of the injuries are inflicted with guns and knives .... In view of these facts, we cannot blind ourselves to the need for law enforcement officers to protect themselves ... .

Therefore, in order to protect society against these dangers and costs, this Court has generally provided government officials with a "qualified immunity, shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson,* 483 U.S. at 638. It is clearly in the interest of all law-abiding citizens and residents of this nation that law enforcement officers possess the necessary latitude and discretion to perform their job effectively without the constant fear of lawsuits. Here, such immunity entitles the Petitioner to summary judgment if, in light of clearly established principles governing the use of force, he could, as a matter of law, have reasonably believed that his specific actions in arresting the Respondent, removing him, and placing him in a van, were lawful. *Id.* at 641.

B. The Ninth Circuit's ruling would make the determination of qualified immunity in excessive

force cases rest on the jury's or judge's eventual decision on the issue of liability in lawsuits alleging unconstitutionally excessive use of force, thus combining these two issues. This combination creates a major exception for the application of qualified immunity in many, if not all, excessive force lawsuits against law enforcement officers. Such an exception for excessive force cases negates and defeats one of the important policy reasons underpinning qualified immunity, an entitlement not to stand trial and a defense against lawsuit and contradicts *Anderson's* expressed rejection of such exceptions.

Excessive force cases are often different than many other types of § 1983 or *Bivens*' actions seeking damages for violations of an individual's constitutional rights. For example, unless the law was clearly established on the use of a certain type of a physical restraint instrument or device at the time of an arrest or seizure, (*see, e.g., Wagner v. Bay City, Texas*, 2000 WL 1285264 (5th Cir. September 27, 2000)), many excessive force cases are admittedly fact-intensive on the issue of liability, requiring a trial when the facts are disputed at the pre-trial stage and not readily subject to summary judgment or dismissal on the merits.

It does not follow, however, that the determination of qualified immunity before trial should likewise be necessarily postponed in many, if not most, excessive force cases. This is because the existence of a material dispute on one or more facts preventing summary judgment for the officer on the issue of liability does not necessarily mean that qualified immunity cannot be resolved by summary judgment. This is because the trial court's focus is narrower on the issue of qualified immunity. Thus, as to many excessive force claims, there is likely to be sufficient circumscribed factual information, as in this case, to show that qualified immunity was justified. If that is not the situation, then either the jury can render a verdict on that issue separately, based on clear instructions, or, more appropriately, the judge can make

a legal determination after trial.[9]

The Ninth Circuit's 'identical-issues' ruling in this case creates a major exception to the availability of qualified immunity in many, if not most, excessive force cases involving some material dispute of facts. Combining both issues together means that qualified immunity will not be considered at any early stage in the litigation and separately from liability. Moreover, applying the same "reasonableness standard" means that the finding of immunity will likely parallel the finding of liability, especially after trial when a trial judge would likely have to show much courage to render judgment on qualified immunity grounds in favor of the officer after a jury verdict on liability in favor of the plaintiff. Thus, qualified immunity will either be unavailable in all by a few rare cases or be irrelevant if no liability is found on the merits. Such results will defeat the reason for the immunity and will render the doctrine obsolete in excessive force cases.

This Court in *Anderson v. Creighton* expressly rejected that approach of creating an exception to the general rule as to when qualified immunity applies.[10] The Court refused to create an exception because, "Harlow clearly expressed the understanding that the general principle of qualified immunity it established would be applied 'across the board.'" *Id.* at 645. As in *Anderson*, the Ninth Circuit's approach of effectively creating an exception in excessive force cases, by requiring that any qualified immunity

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[9] If, however, as a matter of law, a court cannot find qualified immunity prior to trial and if that issue is appealed and the appellate court affirms that finding during an interlocutory appeal, then the question is still appropriate for the jury, apart from the issue of the existence of a constitutional violation and liability. Therefore, a jury may justifiably find that a law enforcement officer, who violates a plaintiff's constitutional right by using excessive force, is entitled to qualified immunity, whenever the jury assesses conflicting evidence and determines that the officer, in good faith, reasonably believed his or her actions were justified in self-defense or in defense of others. *See Snyder v. Trapagnier*, 142 F.3d 791 (5th Cir. 1998), cert. granted, 525 U.S. 1098 (1999), cert. dismissed, 526 U.S. 1083 (1999).

[10] The Court rejected the plaintiffs' assertion that "no immunity should be provided to police officers who conduct unlawful warrantless searches of innocent third parties' homes in search of fugitives." 483 U.S. at 644.

determination await trial and that such determination parallel the decision or verdict on liability, as the Court has stated, "would introduce into qualified immunity analysis a complexity rivaling that which we found sufficiently daunting to deter us from tailoring the doctrine to the nature of the officials' duties or the rights allegedly violated." *Id. See also Graham v. Connor*, 490 U.S. 386, 394 (1989), where this Court rejected the notion that "all excessive force claims brought under § 1983 are governed by a single generic standard." *Id.* at 393.

In addition, under the Ninth's Circuit's 'excessive-force' exception, a pretrial determination on qualified immunity could occur *only* under two circumstances, *either* when a reported appellate or even trial court decision in that jurisdiction or circuit considered the same or very similar set of facts—clearly establishing the law, *or* if the case was so obviously frivolous with no dispute as to the material facts, which would still be rare under the Ninth Circuit's expansive decision. The *Anderson* court specifically rejected this type of approach:

> [W]e have been unwilling to complicate qualified immunity analysis by making the scope or extent of immunity turn on the precise nature of various ... duties or the precise character of the particular rights alleged to have been violated. An immunity that has an many variants as there are modes of official action and types of rights would not give conscientious officials that assurance or protection that it is the object of the doctrine to provide.

Ibid. at 643.

Here, without a reversal of the Ninth Circuit's decision, this *new exception* will severely limit the availability of qualified immunity in lawsuits claiming excessive force, and the purpose that qualified immunity serves in many, if not most, excessive-use-of-force cases will have been thwarted.

II. The "objective reasonableness" component of the judicial inquiry as to the lawfulness of an officer's

II. The "objective reasonableness" component of the judicial inquiry as to the lawfulness of an officer's conduct under the Fourth Amendment, is not the same as the objective "reasonableness-of-officer's-belief" component of the inquiry as to the officer's qualified immunity. If both were the same, the consequences would be that qualified immunity would rarely be applicable in excessive force cases but would instead become a futile and unavailing doctrine.

The application of two different 'reasonableness' standards causes no inconsistency violative of the Fourth Amendment. In two decisions, *Malley v. Briggs*, 475 U.S. 335 (1986) and *Anderson*, this Court held that police officers can assert qualified immunity as a defense if their conduct was objectively reasonable, even if the officers acted unreasonably and in violation of a suspect's Fourth Amendment rights. *Anderson* rejected the notion that a court cannot extend qualified immunity to police officers alleged to have conducted an unreasonable search or seizure. That notion "is foreclosed by the fact that we have previously extended qualified immunity to officials who were alleged to have violated the Fourth Amendment." *Anderson*, 483 U.S. at 643. (citations omitted) Police officers are entitled to qualified immunity when, "their decision was reasonable, even if mistaken." *Hunter v. Bryant*, 502 U.S. at 229 (1991). Therefore, a police officer's conduct may be unreasonable within the meaning of the Fourth Amendment but nevertheless objectively reasonable for qualified immunity purposes under § 1983 claims.[11]

Flowing from these and other decisions by this Court, six United States courts of appeals—the First, Second, Fourth, Fifth, Eighth, and Eleventh Circuits—apply the rule that the force used by an officer may have been so excessive as to have violated the Fourth Amendment but that the officer can still protected from further suit by qualified immunity.[12] Thus, this Court's precedents

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[11] The impetus behind qualified immunity is to supply government officials with the ability to "reasonably anticipate when their conduct may give rise to liability for damages." *Anderson*, 107 S.Ct. at 3042 (1987).

[12] *See McNair v. Coffey*, 2000 WL 1801253 (7th Cir. 2000) which lists the

(as refined by decisions emanating from circuit courts) have developed one overriding standard, as follows: A trial court or appellate court may find that a law enforcement officer, who may have violated or did violate the plaintiff's constitutional rights by using excessive force, is entitled to qualified immunity when the judge (or, as necessary a jury) determines that the officer reasonably believed his or her actions were lawful and justified, in light of the information possessed at the time. If, by chance, there is clearly established law applying to and prohibiting the specific force in question, which should have been known by and otherwise been apparent to a reasonable police officer, then the officer's a belief as to the force used was unreasonable, thereby precluding qualified immunity. "[I]t is for the district court to determine whether the unlawfulness of [officer's] conduct should have been apparent to [the officer] at the time." *Finnegan v. Fountain*, 915 F.2d 817 , 824 (2nd Cir. 1990).

The only possible overlap between these two reasonable tests, the one pertaining to immunity and the other to liability, is the emphasis on the word "reasonableness," and the need to consider the officer's perspective in making both determinations. The problem with the Ninth Circuit's decision is confusion between the concept 'reasonable officer' and the concept of a 'reasonable belief held by an officer'. *Anderson* addressed the confusion arising from the linguistic similarity between the Fourth Amendment's reasonableness standard and the qualified immunity reasonableness standard. It indicated that the terminology used is not the guiding factor and does not mean that the standards are identical. The passage from *Anderson* is instructive:

> Its surface appeal is attributable to the circumstance that the Fourth Amendment's guarantees have been expressed in terms of "unreasonable" searches and seizures. Had an equally serviceable term, such as "undue" searches and seizures been employed, what might be termed the 'reasonably unreasonable' argument against application of Harlow to the Fourth

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seminal decision for each of these circuits, and cases from each circuit are cited in the Petition for cert. , at 13-15, in this case.

> Amendment would not be available--just as it would be available against application of Harlow to the Fifth Amendment if the term 'reasonable process of law' had been employed there. The fact is that, regardless of the terminology used, the precise content of most of the Constitution's civil-liberties guarantees rests upon an assessment of what accommodation between governmental need and individual freedom is reasonable, ...

483 U.S. at 643-645. In *Oliveira v. Mayer*, 23 F.3d 642 (2nd Cir. 1994), the Second Circuit, citing *Anderson*, explained how use of the word 'reasonable' or 'reasonableness' does not convert the qualified immunity and liability standards into an identical one:

> [W]e have been instructed [by *Anderson*] that the objective reasonableness component of the inquiry as to lawfulness is not the same as the objective reasonableness component of the inquiry as to qualified immunity... The result of the distinction between reasonableness as a component of a Fourth Amendment violation and reasonableness as a component of an immunity defense is that an officer is protected in some circumstances ... when he reasonably believes that a reasonably prudent police officer would have acted even though a reasonably prudent police officer would not have acted.

23 F.3d at 648-49. The distinction between the reasonableness standard for qualified immunity and the reasonableness standard for Fourth Amendment violations has also been described to rest on "the less stringent reasonable man standard of the tort action against governmental agents." *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 456 F.2d 1339, 1348-1349 (2nd Cir. 1972) (Lumbard, J., concurring), *upon remand*, 403 U.S. 388 (1971). [13]

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[13] The Second Circuit explained that the lesser standard for qualified immunity is appropriate because "officers cannot be expected to predict what federal judges frequently differ among themselves." *Id.* There, the court concluded, at 1349: "It would be contrary to the public interest if federal officers were held

Because police officers work and have to make split second decisions in an environment which includes circumstances that are "tense, uncertain, and rapidly evolving", *Graham v. Connor*, 490 U.S. 386, 397 (1989), they are given substantial latitude in determining whether and what type of force can be used.

> Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.

United States v. Cortez, 449 U.S. 411, 418 (1981).

In determining whether an officer acted reasonably for qualified immunity purposes, the issue is whether the officers acted "reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact." *Hunter*, 502 U.S. at 228 (1991). Thus, in deciding that the agents acted reasonably and were entitled to qualified immunity, this Court examined the "facts and circumstances within their knowledge and of which they had reasonably trustworthy information" at the time of the arrest *Id.* at 228.

Although *Graham v. Connor* did not involve a claim of qualified immunity, there, the Court stated, "Similarly, the officer's objective 'good faith'–that is, whether he could reasonably have believed that the force used did not violate the Fourth Amendment–may be relevant to the availability of the qualified immunity defense to monetary liability under [section] 1983." 490 U.S. at 399, n.12.

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to a probable cause standard as in many cases they would fail to act for fear of guessing wrong. Consequently the law ought to, and does, protect government agents if they act in good faith and with a reasonable belief in the validity of the arrest and search."

Qualified immunity protects police officers who make "mere mistakes in judgment, whether the mistake is one of fact or one of law.". *Karnes v. Skrutski*, 62 F.3d 485, 498 (3rd Cir. 1995). "[Q]ualified immunity is available as a defense to ... an objectively unreasonable use of excessive force under the Fourth Amendment." *Brown v. Glossip*, 878 F.2d 871, 873-874 (5th Cir. 1989). Thus, even if a plaintiff proves excessive force, to overcome the defendant's immunity defense, the plaintiff must still allege facts sufficient to show that the defendant did not act in objective good faith .... *Id.* at 874 *See Quezada v. County of Bernalillo et al.*, 944 F.2nd 710, 718 (10th Cir. 1991).

The Ninth Circuit and other circuits have chosen to follow a different path in this case, oblivious to the precedents of this Court. That court's decision in this case clearly mischaracterizes the standard for qualified immunity. In an effort to distinguish *Anderson*, the Ninth Circuit inaccurately states that the Supreme Court's analysis in *Anderson* addressed only the first prong, the 'clearly-established' element, not the second element of 'objective reasonableness'. 194 F.3d at 969. Clearly, the language in *Anderson* was not so limited, as clear from the language already quoted from *Anderson* in this brief, *supra*.[14] *Anderson* and its progeny leave no doubt that there is a difference between a good faith "reasonable" belief, supported by the circumstances, and the reasonableness of the action taken under the Fourth Amendment. Even without these Supreme Court precedents, common sense would dictate that result.

Contrary to the opinion below, the only difference in applying the standard for qualified immunity and the one for liability is *not* the first prong, i.e. whether the law was clearly established. (If the law was not clearly established, then the standards for both qualified immunity and liability are identical, according to the Ninth Circuit.) The Ninth Circuit's decision

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[14] For example, the following language in the Ninth Circuit's opinion confirms mischaracterizes the standard: "An officer cannot have an objectively reasonable belief that the force used was necessary (entitling the officer to qualified immunity) when no reasonable officer could have believed that the forced used was necessary (establishing a Fourth Amendment violation)." *Katz*, 194 F.3d at 969.

disregards the reality that in excessive force cases, including those arising out of arrests, detentions, or the use of deadly force, there is often no other case with the same set of facts and thus directly on point concerning the amount of force used, as contrasted with a special type of force on which there are specific court decisions. Thus, a general proscription in law against use of excessive force does not equate with clearly established law of which the officer should have been aware.

The Second Circuit in *Finnegan v. Fountain*, 915 F.2d 814, 823 (2d Cir. 1990) analysis exposes the fallacy of this approach:

> Although it can be said that the right of an individual not to be subjected to excessive force is "clearly established" in the convention sense, the Supreme Court in *Anderson v. Creighton*, (citation omitted), has cautioned against framing what is a "clearly established right at this level of generality: ... In other words, to say that the use of constitutionally excessive force violates a clearly established right, according to the Supreme Court, begs the open question whether the particular decree of force under the particular circumstances was excessive. ... Rather, *Anderson* advises that a middle approach is to be taken: the facts and circumstances of each case must be examined ....

In its wisdom, the Court in *Anderson* provides the clarity needed in making this determination, as follows:

> [O]ur cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant sense: The contours of the right [alleged to have been violated] must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. That is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful (citation omitted); but it is to say that

> in the light of pre-existing law the unlawfulness must be apparent. (citation omitted).

Anderson, 483 U.S. at 640.

This Court reaffirmed *Anderson* in *Wilson v. Layne*, 119 S.Ct. 1692 (1999). The question in *Wilson*, "whether a reasonable officer could have believed that bringing members of the media into a home during the execution of an arrest warrant was lawful, in light of clearly established law and the information the officers possessed, ..." *Id.* at 1700, is basically the same question in this case, even if posed differently to reflect the different factual context. A Fourth Circuit decision involving a claim of excessive force framed the issue, as follows. "[T]he question is whether, confronted with the facts of this case, reasonable police officers should have known that clearly established constitutional law prohibited the methods used in the search [involving the use of force]. *Taft v. Vines*, 83 F.3d 681, 684 (4th Cir. 1996).[15]

Applying *Wilson*, the key question in this case, which the district court and then the appellate court should have asked is, as follows: Whether Petitioner could have reasonably believed that the use of force was lawful to restrain and remove the Respondent or otherwise carry out his arrest, in order to prevent a public disturbance, based on the information the officer possessed at the time? Alternatively, to state it differently—paraphrasing *Taft:* Whether, confronted with the facts of this case, reasonable military police officers should have known that clearly established constitutional law prohibited the methods used in arresting the Respondent, removing him, and placing him into a van.

While there may be some narrow disputes of fact in this case, there is sufficient evidence, including the videotapes of the incident—a rarity in these cases—, that, as a matter of law, a district court should have dismissed the Petitioner from the

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[15] In *Taft*, the court upheld a finding of qualified immunity, even though the force used in *Taft* was allegedly a shotgun held within six to seven inches of the mistaken suspect's head, force that is obviously qualitatively different than the force used in the instant case.

lawsuit. If there were ever a case justifying the application of qualified immunity, it is this one. We urge the Court to rule that it was not unreasonable for a military officer to have believed that the force used to arrest the Respondent, to quickly remove the him from the Presidio ceremony, and to place him a van out of sight, to prevent a public protest or stop a disturbance of an important event, was lawful. In the absence of a clearly-established prohibition on the methods used in this case for such a public event, the Petitioner is deemed to have acted under a reasonable belief that the his actions were consistent with the Fourth Amendment. Thus, the Petitioner should have been granted qualified immunity by the district court.

III. As matter of law, an officer should be granted qualified immunity when the key facts show a de-minimis or minimal amount of force used against a plaintiff, combined with a minor or non-existent injury, as long as the essential material facts supporting a finding of qualified immunity are uncontroverted. Petitioner's use of force in arresting and removing Respondent, without causing any injury to him or any pain, was so minimal, even under Respondent's more dramatic version of events, that it clearly did not exceed the amount of force permitted by the Fourth Amendment and therefore summary judgment on qualified immunity was clearly warranted on that ground alone.

Not every impairment or government restraint on liberty amounts to a constitutional violation. "On a quantitative level, we have, to be sure, acknowledged that not every modest impairment of individual liberty amounts to a deprivation raising constitutional concerns. (citation omitted)" *Albright v. Oliver*, 114 S.Ct. 807, 824 (1994) (Stevens, J., dissenting). In addition, this Court "has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Graham*, 490 U.S. at 396. "'Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers,' *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973), violates the Fourth Amendment." *Graham*, 490 U.S. at 396.

The Eleventh, Fifth, Second, Fifth, Eight, and Eleventh Circuits apply the principle of de minimis or minimal use of force and grant qualified immunity to the defendant officers whenever the force used by a law enforcement officer was minimal and the injuries were minor or non-existent.

In *Nolin v. Isbell*, 207 F.3d 1253 (11th Cir. 2000), the Eleventh Circuit discussed how that circuit applies the principle of de minimis force to qualified immunity questions.

> This Court has explained that when applied in excessive force cases, "qualified immunity applies unless the application of the standard would inevitably lead every reasonable officer in [the position of the defendant officer] to conclude that the force was unlawful." *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1559 (11th Cir. 1993), *modified* 14 F.3d 583 (11th Cir. 1994).
>
> ...
>
> *Post* ... conclud[ed] that in making the highly fact-intensive excessive force inquiry, a court may conclude that an officer retains qualified immunity when the facts show a minimal amount of force combined with a minor or non-existent injury.

207 F.3d at 1256-1257.

In *Nolin*, the court of appeals observed that it had reversed district court denials of qualified immunity for officers in at least three prior cases, relying upon the principle of de minimis force. *Id.* at 1256. It is instructive to turn to the instances of excessive force alleged by the plaintiffs in *Nolin* and these three other cases. In *Nolin*, the plaintiff, who was involved in a fight, claimed that the officer grabbed him from behind the shoulder and wrist, threw him against a van three or four feet away, kneed in the back and pushed his head into the said of the van, searched his groin in an uncomfortable manner, and handcuffed him, causing bruises to the plaintiff in several places, although they quickly disappeared and no medical treatment was sought. The court stated, "Certainly, these circumstances would not 'inevitably lead' a reasonable

officer in the officers' position to conclude that the force used to apply the handcuffs was unlawful." *Id.*

In the three other excessive force cases cited in *Nolin* on this point, the Eleventh Circuit ruled in favor of qualified immunity for law enforcement officers. In *Post*, the officer pushed the plaintiff against the wall and applied a choke hold, even though the plaintiff did not resist; "reasonable doubt existed and still exists, on whether this amount of unnecessary force was unlawful." 7 F.3d at 1559-60 (citations omitted). In *Gold v. City of Miami*, 121 F.3d 1442 (11th Cir. 1997), the plaintiff, arrested for disorderly conduct, was placed in handcuffs and then complained that the officer had applied them too tightly and had refused to loosen them, causing the plaintiff pain but only minor skin abrasions for which no medical treatment was sought; "[t]he minor nature of this injury reflects that minimal force was used to apply the handcuffs. Certainly these circumstances would not 'inevitably lead' a reasonable officer in the officers' position to conclude that the force used to apply the handcuffs was unlawful." *Id.* at 1446-1447. In *Jones v. City of Dothan*, 121 F.3d 1456 (11th Cir. 1997), the officer slammed the plaintiff against the wall, kicked his legs apart—causing pain in an arthritic knee, required him to raise his arms above his head—which caused pain due to a prior stroke, and pulled his wallets from his pants. *Id.* at 1460. "While the use of force ... may have been unnecessary, the actual force used and the injury inflicted were both minor in nature. *Id.* at 1460-61.

The Fifth Circuit takes a slightly different approach than the Eleventh Circuit, emphasizing the requirement that there by an injury. In *Williams v. Bramer*, 180 F.3d 699 (5th Cir. 1999), the plaintiff alleged that the officers violated his rights by choking him while conducting a search of his mouth to find drugs and then choking him again when he complained about the first choking. While reversing a district court finding of qualified immunity on the second choking, the court upheld the qualified immunity on the first choking, because of a lack of injury. The court stated

> [W]e do require a plaintiff asserting an excessive force claim to have "suffered at least some form of injury" (citation omitted). Furthermore, we have

> shaped our analysis so that we do not permit a cause of action for every contact between a citizen and a police officer: "In just about every conceivable situation, some amount of force or contact would be too nominal to constitute a constitutional violation. When the force used is insufficient to satisfy the legal standard necessary for recovery, the amount of force is de minimis for constitutional purposes." (citation omitted). In determining whether an injury caused by excessive force is more than de minimis, we look to the context in which that force was deployed. ...

180 F.3d at 703-04.

In another minimal force case, *Lennon v. Miller*, 66 F.3d 416 (2d Cir. 1995), the defendant officer asked the plaintiff to get out of her car but she remained in the driver's seat and refused to budge. The officer arrested her, pulled her hand off the ignition, placed his arm around her neck, shoulder, right arm, and forcibly removed her from the car. The only injury was to the plaintiff's right wrist, for which she was treated at a hospital (however, there was no information pled as to the extent of her injuries). The Second Circuit affirmed a summary judgment for the officer on qualified immunity grounds, based on the amount of force use:

> [N]o rational jury could have found that the force used was so excessive that no reasonable officer would have made the same choice. ... The intrusion on Mrs. Lennon's Fourth Amendment rights, if any, was extremely limited. It was objectively reasonable for [the officer] to believe that in pulling plaintiff from the car to effect her arrest, he was not infringing on her Fourth Amendment rights. Under the circumstances described above, no jury could find that it was objectively unreasonable for the officers to believe that the forced used to remove Mrs. Lennon from the car was not excessive.

66 F.3d at 426.

In *Curd v. City Court of Judsonia, Arkansas*, 141 F.3d 839 (1998), the plaintiff alleged excessive force because the police chief seized her arm, spun her around and told her to get into the police car and also because she was fingerprinted three separate times. The district granted summary judgment for the officers on qualified immunity grounds, and the appeals court affirmed:

> ... Even if seizing Curd's arm and turning her body was unnecessary to effect the arrest, we cannot conclude that this limited amount of force was objectively unreasonable. [footnote omitted] See, e.g., *Joos v. Ratliff*, 97 F.3d 1125, 1126 (8th Cir. 1996) (per curiam) ("de minimis" amount of force in effecting an arrest would be insufficient to create constitutional issue). ... See also *Haberthur v. City of Raymore*, 119 F.3d 720, 723 (8th Cir. 1997) ("Section 1983 is intended to remedy egregious conduct, and not every assault or battery ... will create liability under it.") Our conclusion is bolstered by the fact that Curd does not allege, and there is no evidence, that she was injured or experienced physical pain as a result of Hale's actions. (footnote omitted.) The conduct of Chief Hale in arresting Curd was not so egregious that we can find a constitutional violation.

141 F.3d at 841-42.

The approaches taken in these decisions is certainly justified under *Anderson* to promote the public interest underpinning qualified immunity and to clear the courts of what are truly frivolous lawsuits under the Fourth Amendment.

Turning to the case at hand, taking the plaintiff's allegations as true and with the evidence on the videotape, the force involved in removing the Respondent and in placing him in the van was nominal and minimal, as supported by a lack of any injury. Also, the force used was of the type that police officers could reasonably expect to use to remove an individual quickly from a crowd to prevent a public disturbance. Under the any of these standards

established by the Second, Fifth, Eighth, and Eleventh Circuits, qualified immunity should have been granted for the Petitioner by way of summary judgment as a matter of law.

The Eleventh and Second Circuit formulations are especially relevant to the instant case. *First*, the circumstances here would not 'inevitably lead' a reasonable officer in Petitioner's position to conclude that the force used to remove Respondent and push him into the van was unlawful, the Eleventh Circuit's test.*Second,* no rational jury could have found that the force used by Petitioner was *so* excessive that no reasonable officer would have made the same choice, the Second Circuit's standard.

While the Fifth and Eighth Circuit's cases cited did grant qualified immunity, they predicated their decisions on the definite absence of any constitutional violation and thus the lack of liability. This is consistent, because if there is no constitutional violation, then it invariably follows that the grounds for qualified immunity also exist. Applied to the instant case, the standards from those circuits would justify qualify immunity in this case. *First*, here, the Respondent did not suffer any form of injury, the Fifth Circuit's requirement. *Second,* the limited force in arresting and removing the Respondent, combined with no injury, was not so egregious that the court of appeals could find a constitutional violation, the Eight Circuit's formulation.

Application of any of these standards would serve the public purpose of immunizing a police officer from lawsuit at an early stage, not during or after trial. *Amicus curiae* respectfully suggests that the Court adopt either the Eleventh Circuit's 'inevitably lead ...' standard or the Second's Circuit's 'no rational jury ...' formulation. The absence or presence of a minor injury is certainly very relevant, but should not be determinative.

The Ninth Circuit's opinion disregarded the amount of force involved and the lack of any injury to Katz. The Ninth Circuit invoked the list of factors making up the analysis required by *Graham* in determining whether the force was objectively reasonable for qualified immunity purposes, expanding *Graham* beyond its scope, which was whether the force used violated the

Fourth Amendment.[16] *Amicus curiae* has been unable to find any specific holding by this Court incorporating the *Graham* standards into the qualified immunity analysis in excessive force cases, notwithstanding the court of appeals' reliance upon *Graham*.

CONCLUSION

Following this Court's past precedents, an officer who is a defendant in a *Bivens* or § 1983 action should be protected by qualified immunity at the earliest stage of a lawsuit, whenever the officer reasonably believes that at the time some apparent force was lawfully necessary to effectuate an arrest, restrain an individual, or take some other related action, *notwithstanding* any possibility that there could be a subsequent determination (or even an actual determination) of an unconstitutionally excessive use of force and liability. Alternatively, whenever it is undisputed, for the most part, that the force used in effectuating an arrest or restraining an individual is minimal, combined with the lack of more than a very minor injury, qualified immunity should apply as a matter of law, even if it clearly appears that the force was excessive and unnecessary.

Therefore, *amicus curiae* respectfully requests that the Court reverse the judgment of the U.S. Court of Appeals for the Ninth Circuit and find that, as a matter of law, the Petitioner is entitled to qualified immunity. The precedents of this Court and the public interests on which they are based require no less.

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[16] The Ninth Circuit relied heavily on *Liston v. County of Riverside*, 120 F.3d 965 (9th Cir. 1997), where it applied the *Graham* three part analysis. That case is readily distinguishable from the instance one, and it is inconceivable that the facts of that case would have put a military police officer on apparent notice that the force used in this case was unlawful. The force in *Liston* was very different qualitatively and quantitatively than the force here. There, the officers pointed guns at and commanded plaintiff Jimmy Liston to both get down and raise his hands—contradictory commands that led him to not move, which then led to an officer grabbing him from behind and throwing him down on the floor and injuring him. One officer placed a foot on his back and another officer stood on his hands. At one point, a gun was stuck at the temple. In addition, Liston's suffered injury. *Id.* at 971.

Respectfully submitted this eight day of January 2001,

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JAN 8 2001 (8)

Supreme Court, U.S.
FILED
JAN 8 2001
CLERK

No. 99-1977

In the Supreme Court of the United States

DONALD SAUCIER,
Petitioner,
v.
ELLIOT M. KATZ AND IN DEFENSE OF ANIMALS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE STATES OF TEXAS, ALABAMA, ALASKA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, ILLINOIS, LOUISIANA, MARYLAND, MASSACHUSETTS, MISSISSIPPI, MONTANA, NEBRASKA, NEW YORK, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether, in a case alleging the use of constitutionally excessive force, the test for qualified immunity and the reasonableness test under the Fourth Amendment are identical, such that a finding of unreasonable force under the Fourth Amendment necessarily precludes the officer from being entitled to qualified immunity.

2. Whether the court of appeals erred in concluding, based on the facts known to it "at this stage of the case," that petitioner's use of force in arresting respondent, which consisted of carrying respondent from the crowd to a waiting van and pushing him inside, without injuring him or placing him in any pain, so clearly exceeded the amount of force permitted by the Fourth Amendment as to warrant denial of qualified immunity.

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No. 99-1977

In the Supreme Court of the United States

DONALD SAUCIER,

Petitioner,

v.

ELLIOT M. KATZ AND IN DEFENSE OF ANIMALS,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE STATES OF TEXAS, ALABAMA, ALASKA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, ILLINOIS, LOUISIANA, MARYLAND, MASSACHUSETTS, MISSISSIPPI, MONTANA, NEBRASKA, NEW YORK, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

This case asks whether qualified immunity remains an available defense to a claim of excessive use of force under the Fourth Amendment. The Ninth Circuit erroneously equated the merits inquiry (objectively reasonable force) with

the qualified immunity inquiry (objective legal reasonableness) and held that an officer who uses excessive force necessarily forfeits qualified immunity as a matter of law. *Katz v. United States*, 194 F.3d 962 (CA9 1999). Because such reasoning cannot be squared with this Court's qualified immunity jurisprudence, *amici* urge the Court to reverse the judgment of the Ninth Circuit.

INTEREST OF *AMICI*

The States of Texas, Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Illinois, Louisiana, Maryland, Massachusetts, Mississippi, Montana, Nebraska, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Vermont, and Washington appear as *amici curiae* in support of Petitioner. *See* SUP. CT. R. 37.4.

Amici have an interest in this case because it directly impacts state law enforcement. Certainly, *amici* do not condone the use of excessive force by peace officers in the course of performing their duties. *Amici* recognize, however, that an officer whose conduct is later determined by a court to violate the Fourth Amendment may have acted under a reasonably mistaken belief that his or her conduct was permissible in light of clearly established law. In such cases, qualified immunity is a vital shield against both suit and liability for a Fourth Amendment violation.

If the Court were to abrogate or limit the qualified immunity defense in the context of excessive force cases, peace officers would be subject to the burdens of full-blown discovery and trial notwithstanding the objective reasonableness of their conduct in light of clearly established

law. This would unduly disrupt state law enforcement efforts and compromise public safety, because officers would spend more time in court and less time preserving the peace. Eliminating qualified immunity as a defense to excessive force claims could also impede recruitment efforts, as the increased threat of personal liability might deter candidates from public service. Such a dramatic departure from qualified immunity jurisprudence is not warranted, and *amici* urge the Court to reverse the judgment of the Ninth Circuit.

SUMMARY OF ARGUMENT

In *Anderson v. Creighton*, 483 U.S. 635 (1987), the Court held that qualified immunity is an available defense to a violation of the Fourth Amendment. *Anderson* explicitly rejected the argument that conduct that violates the Fourth Amendment's "reasonableness" standard—for example, an unreasonable search or unreasonable seizure—necessarily is "unreasonable" for purposes of qualified immunity as well. *See id.*, at 643-44. Declining to carve out a Fourth Amendment exception to qualified immunity, the Court observed that "it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and we have indicated that in such cases those officials—like other officials who act in ways they reasonably believe to be lawful—should not be held personally liable." *Id.*, at 641. Furthermore, the Court acknowledged that *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), "clearly expressed the understanding that the general principle of qualified immunity it established would be applied 'across the board.'" *Anderson*, 483 U.S., at 645.

For purposes of qualified immunity, there is no principled distinction between unreasonable force and other types of unreasonable conduct in violation of the Fourth Amendment. *Anderson* provides the answer: just as there is no inherent conflict between an unreasonable search or seizure and qualified immunity, there is no inherent conflict between excessive force and qualified immunity. *See* 483 U.S., at 643-44.

The excessive force standard established in *Graham v. Connor*, 490 U.S. 386 (1989), was never intended to encapsulate the protections of qualified immunity. *Graham* does not reference clearly established law or *Harlow*'s notion of objective legal reasonableness—*i.e.*, a reasonable, albeit mistaken, belief that conduct does not violate clearly established rights of which a reasonable officer would have known. Nor was *Graham* designed to strike the policy compromise that underlies the doctrine of qualified immunity—namely the need to balance vindication of civil rights abuses with preservation of government stability and promotion of public service through expedient resolution of insubstantial constitutional claims. Finally, *Graham* provides officers none of the procedural protections that accompany qualified immunity, including the right to interlocutorily appeal a district court's erroneous rulings on abstract issues of law concerning the defense. If excessive force cases are to be governed solely by *Graham*, without reference to qualified immunity or its attendant protections, then officers routinely will be subjected to the burdens of discovery and trial. That result would be inconsistent with *Harlow* and its progeny, and it would squarely conflict with *Anderson*.

Because all public servants, including police officers, are entitled to invoke qualified immunity when they perform discretionary functions in a manner that is objectively reasonable, the Court should reconfirm the core protections of *Harlow* and reject the Ninth Circuit's conclusion that an officer who uses excessive force forfeits qualified immunity as a matter of law.

ARGUMENT

I. A FINDING OF EXCESSIVE FORCE DOES NOT NECESSARILY PRECLUDE, AND IS NOT INHERENTLY IRRECONCILABLE WITH, QUALIFIED IMMUNITY.

The Ninth Circuit erroneously concluded that "the defense of qualified immunity in a claim of excessive force under the Fourth Amendment is the same as the reasonableness inquiry on the merits of such a claim." *Katz*, 194 F.3d, at 970-71. The court's determination that fact issues as to excessive force required denial of qualified immunity reflects a fundamental misunderstanding of the doctrine. The purpose of qualified immunity is to protect officers who commit constitutional violations, provided the challenged conduct could have appeared objectively reasonable in light of clearly established law. *See, e.g., Harlow*, 457 U.S., at 818-19. If qualified immunity required the absence of a violation, the defense would serve no purpose.

Unreasonable conduct in violation of the Fourth Amendment is no exception to the rule. To the contrary, the Court has consistently applied qualified immunity in a variety of Fourth Amendment contexts. *See, e.g., Wilson v. Layne*, 526 U.S. 603, 614-15 (1999) (media ride-along during home search); *Anderson*, 483 U.S., at 641 (warrantless home entry);

Malley v. Briggs, 475 U.S. 335, 344-45 (1986) (warrant affidavit unsupported by probable cause); *Mitchell v. Forsyth*, 472 U.S. 511, 534 (1985) (illegal wiretap). Carving a new excessive force exception out of the defense would defeat qualified immunity's delicate balance between promoting civil rights and protecting public servants whose objectively reasonable mistakes result in constitutional violations.

A. Qualified Immunity Reflects an Important Policy-Driven Compromise.

The touchstone for qualified immunity is "objective legal reasonableness." *Harlow*, 457 U.S., at 819. "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.*, at 818. *Harlow*'s "objective legal reasonableness" standard reflects an attempt to accommodate competing policy goals: a desire, on the one hand, to redress civil rights abuses, and a need, on the other hand, to promote government service and minimize government disruption through the expedient resolution of insubstantial civil rights claims. Qualified immunity is an imperfect, often paradoxical creature of compromise, but it strikes the best "balance between the evils inevitable in an available alternative." *Id.*, at 813.

At the heart of qualified immunity is a recognition that government officials who make mistakes and commit constitutional violations do not necessarily forfeit qualified immunity. Instead, a defendant retains qualified immunity, notwithstanding a constitutional violation, provided an official

in the defendant's position reasonably, albeit mistakenly, could have believed the conduct in question was lawful. *See id.*, at 818-19. In other words, a defendant's *reasonably* mistaken understanding of the law does not preclude qualified immunity.

B. Excessive Force Is Indistinguishable from Other Types of Unreasonable Conduct for Which Qualified Immunity Is an Available Defense.

In *Graham v. Connor*, the Court considered which standard to apply to excessive force claims arising out of an arrest, investigatory stop, or other seizure. The Court observed that excessive force claims typically would arise under either the Eighth Amendment (in the context of incarceration) or the Fourth Amendment (in the context of an unreasonable seizure). *See id.*, at 394.[1] *Graham* emphasized that the validity of a claim "must then be judged by reference to the *specific constitutional standard* which governs that right, rather than to some generalized 'excessive force' standard." *Id.* (emphasis added). For purposes of allegations of excessive force arising from an arrest, investigatory stop, or other seizure, the Court concluded that those claims "should be analyzed under the Fourth Amendment and its 'reasonableness' standard." *Id.*, at 395. *Graham* drew no distinction, under the Fourth Amendment's reasonableness standard, between a subset of Fourth Amendment claims involving excessive force and a subset of Fourth Amendment

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1. When an individual is neither incarcerated nor seized, a claim may also arise under the Fourteenth Amendment's substantive due process ("shocking to the conscience") standard. *See County of Sacramento v. Lewis*, 523 U.S. 833, 843-44, 846 (1998).

claims involving otherwise unreasonable seizures or unreasonable searches. Instead, the "specific constitutional standard which governs [the] right" to be free of excessive force was deemed to be the general Fourth Amendment standard of reasonableness.

Within the context of Fourth Amendment reasonableness, the Court has long recognized the availability of qualified immunity with respect to claims alleging unreasonable searches in violation of the Fourth Amendment. *See, e.g.*, *Wilson*, 526 U.S., at 614-15; *Anderson*, 483 U.S., at 641; *Malley*, 475 U.S., at 344-45; *Mitchell*, 472 U.S., at 534. In *Anderson*, the Court expressly rejected the argument that "unreasonable" conduct in violation of the Fourth Amendment can never be deemed "reasonable" for purposes of qualified immunity.

> "The short answer to this argument is that it is foreclosed by the fact that we have previously extended qualified immunity to officials who were alleged to have violated the Fourth Amendment. *See Malley, supra* (police officers alleged to have caused an unconstitutional arrest); *Mitchell v. Forsyth*, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed.2d 411 (1985) (officials alleged to have conducted warrantless wiretaps). Even if that were not so, however, we would still find the argument unpersuasive. Its surface appeal is attributable to the circumstance that the Fourth Amendment's guarantees have been expressed in terms of 'unreasonable' searches and seizures. Had an equally serviceable term such as 'undue' searches and seizures been employed, what might be termed the 'reasonably unreasonable' argument against

> application of *Harlow* to the Fourth Amendment would not be available—just as it *would* be available against application of *Harlow* to the Fifth Amendment if the term 'reasonable process of law' had been employed there." *Anderson*, 483 U.S., at 644.

As *Anderson* recognized, the "reasonably unreasonable" argument stemmed from linguistic coincidence, rather than a substantive alignment between qualified immunity and the reasonableness standard governing all Fourth Amendment claims.

The same overarching Fourth Amendment reasonableness standard governs searches, seizures, and uses of force. *See Graham*, 490 U.S., at 394-95. Consequently, the same reasoning employed by the Court in *Anderson* applies in the context of excessive force. *Anderson*'s acknowledgment that it is possible for officers to conduct "reasonably unreasonable" searches and seizures compels the corollary conclusion that it is possible for officers to use reasonably unreasonable force. If an officer who violates the Fourth Amendment and conducts an unreasonable search does not necessarily forfeit qualified immunity, neither should an officer who uses unreasonable force.

There is nothing about the legal standard governing searches and seizures—*i.e.*, probable cause—that renders it more susceptible to error than the legal standard governing excessive force. The contours of probable cause undoubtedly are fuzzy. *See Anderson*, 483 U.S., at 644 ("We have frequently observed, and our many cases on the point amply demonstrate, the difficulty of determining whether particular searches or seizures comport with the Fourth Amendment.").

But, under *Graham*, the contours of reasonable force are not any clearer.

Graham adopted a "totality of the circumstances" approach that, like other Fourth Amendment reasonableness standards, "is not capable of precise definition or mechanical application." *Graham*, 490 U.S., at 396 (citations omitted). An officer, in the midst of "circumstances that are tense, uncertain, and rapidly evolving," should consider such factors as "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight" before deciding what force is required under the circumstances. *Id.*, at 396-97. Certainly, *Graham*'s balancing test creates considerable flexibility; but with that flexibility necessarily come gray areas of law.

The *Graham* factors do not comprise a bright-line test with easy answers. It is inevitable that, under certain circumstances, reasonable officers will disagree about the necessity of a particular use of force. Qualified immunity is designed to protect officers who, in struggling with the fuzzy contours of Fourth Amendment "reasonableness," reasonably miscalculate the parameters of lawful conduct. *See Malley*, 475 U.S., at 341 ("[I]f officers of reasonable competence could disagree on this issue, immunity should be recognized.").

The Court has already held, with respect to probable cause, that "[l]aw enforcement officers whose judgments in making these difficult determinations are objectively legally reasonable should no more be held personally liable in damages than should officials making analogous

determinations in other areas of law." *Anderson,* 483 U.S., at 644. For purposes of excessive force, too, there is no reason to exclude peace officers from the immunity protections afforded public servants in all other constitutional contexts.[2]

Reasonable mistakes that cause unreasonable searches are analytically indistinguishable from reasonable mistakes that cause unreasonable uses of force. The Court embraced the seeming paradox of reasonably unreasonable conduct in *Anderson*, and no departure is warranted simply because the unreasonable conduct at issue is unreasonable force rather

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2. The Second Circuit has suggested that qualified immunity and excessive force may overlap in a manner in which qualified immunity and probable cause do not. *See Finnegan v. Fountain*, 915 F.2d 817, 824 n.11 (CA2 1990) (postulating that excessive force, like qualified immunity, evaluates the reasonableness of an officer's conduct *ex ante*, whereas probable cause evaluates the reasonableness of an officer's conduct *ex post*). However, *Finnegan* expressly acknowledged that its *ex ante/ex post* distinction was derived from Second Circuit law and *not* from anything the Court said in *Anderson*. *Id.* (recognizing that *Anderson* "did not explain how the two standards of reasonableness under the claim and the defense differ from each other," but citing a Second Circuit case that suggests an explanation via an *ex ante/ex post* distinction).

Nothing in *Anderson* supports the conclusion that excessive force should be treated differently than other Fourth Amendment violations for purposes of qualified immunity. Furthermore, language in *Graham* belies any notion of an *ex post/ex ante* dividing line between Fourth Amendment claims. *See* 490 U.S., at 396 (referring to excessive force as being governed by "the *same* standard of reasonableness *at the moment*" as are arrests and searches) (citing *Maryland v. Garrison*, 480 U.S. 79 (1987); *Hill v. California*, 401 U.S. 797 (1971)) (emphasis added).

than an otherwise unreasonable seizure or an unreasonable search.

C. The Standards Governing Qualified Immunity and Excessive Force Are Not Coextensive.

Although the benchmarks for determining qualified immunity (objective legal reasonableness) and excessive force (objectively reasonable force) sound alike, the two inquiries are not identical. The *Graham* inquiry focuses on "whether the officers' actions *are* 'objectively reasonable' in light of the facts and circumstances confronting them." 490 U.S., at 397 (emphasis added). By contrast, the qualified immunity inquiry focuses on whether an objectively reasonable officer, in light of the facts and circumstances confronting the officer could have reasonably, albeit mistakenly, believed the use of force would not violate clearly established rights. *See, e.g., Wilson*, 526 U.S., at 614-15; *Anderson*, 483 U.S. at, 641.

In other words, the merits-based excessive force inquiry asks whether the use of force *was* objectively reasonable under the circumstances, whereas the qualified immunity inquiry asks whether the use of force *could have appeared* objectively reasonable under both the circumstances and the law as clearly established at the time the action occurred. *See Harlow*, 457 U.S., at 818.

Language in *Graham* supports the notion that the inquiries for qualified immunity and excessive force, though closely aligned, are not coextensive. Qualified immunity was not at issue in *Graham*; however, an explicit reference to the doctrine appears in a footnote:

> "[T]he officer's *objective* 'good faith'—that is, whether he could reasonably have believed that the force used did not violate the Fourth Amendment—may be relevant to the availability of the qualified immunity defense to monetary liability under §1983. *See Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed.2d 523 (1987). Since no claim of qualified immunity has been raised in this case, however, we express no view on its proper application in excessive force cases that arise under the Fourth Amendment." 490 U.S., at 399 n.12.

Footnote 12 contains the crucial acknowledgment that an officer's objective "good faith" for purposes of qualified immunity is an inquiry dependent on "whether he *could* reasonably have believed that the force used did not violate the Fourth Amendment." *Id.* (emphasis added). The suggestion that the "could" standard might present a basis for awarding qualified immunity in the context of an excessive force claim implicitly recognizes a distinction between the merits inquiry and the qualified immunity defense. Tellingly, the Court did not ponder whether qualified immunity was coextensive with excessive force; instead, the question left open in footnote 12 was what the "proper application" of qualified immunity would be. In other words, the Court did not ask whether, but how, qualified immunity should apply in excessive force cases.

Amici believe that the proper application of qualified immunity as a defense against an excessive force claim should be the same as the application of the defense in any other context governed by the Fourth Amendment and its "reasonableness" standard. Irrespective of whether a use of

force *was*, in fact, reasonable—*i.e.*, notwithstanding the possibility that a constitutional violation in fact occurred—if an objectively reasonable officer presented with the facts and circumstances *could have believed* that the force used would not violate clearly established rights of which a reasonable officer would have known, then the officer is entitled to qualified immunity.

This case illustrates precisely the type of circumstances in which qualified immunity should apply. Elliot Katz alleges that Officer Saucier used excessive force while placing Katz in a van during an arrest for protest activity. The use of force at issue is, essentially, a shove; and Katz does not claim to have been injured or suffered any pain from this incident. *See* 194 F.3d, at 955; Pet. at (i), 3.

Despite the minimal force employed, the Ninth Circuit determined that a reasonable officer could deem such force excessive under the circumstances. 194 F.3d at 970. *Amici* disagree with the Ninth Circuit's conclusion that Officer Saucier's conduct was not reasonable, *per se*, under the Fourth Amendment.[3] In any event, the court of appeals erred in perfunctorily denying qualified immunity without careful consideration of clearly established law. The Court "has long recognized that the right to make an arrest carries with it the right to use some degree of physical coercion or threat thereof

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3. *Amici* focus this brief on the first question presented but also fully support Petitioner Saucier on the second question presented—*i.e.*, whether "carrying respondent from the crowd to a waiting van and pushing him inside, without injuring him or placing him in any pain, so clearly exceeded the amount of force permitted by the Fourth Amendment as to warrant denial of qualified immunity."

to effect it." *Graham*, 490 U.S., at 396. Given *Graham*'s recognition that "'[n]ot every push or shove' . . . violates the Fourth Amendment," *id.*, an officer in Petitioner Saucier's position reasonably could have believed that carrying Katz away from the crowd and pushing him into a van would not violate his Fourth Amendment rights.

To deprive Officer Saucier of qualified immunity under these circumstances would write clearly established law out of the analysis. Morever, it would mark a dramatic departure from this Court's consistent application of the defense in cases in which Fourth Amendment violations are determined to have occurred, but the Fourth Amendment principles at issue were not clearly established. *See, e.g., Wilson*, 526 U.S., at 614-15 ("Since the police action in this case violated the petitioner's Fourth Amendment right, we must now decide whether this right was clearly established at the time of the search."); *Mitchell*, 472 U.S., at 534 ("The decisive fact is not that Mitchell's position turned out to be incorrect, but that the question was open at the time he acted.").[4]

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4. The Ninth Circuit viewed the only relevant clearly established law as *Graham*'s overarching reasonableness test. *Katz*, 194 F.3d, at 969-70. Since *Graham's* standard was clearly established when Officer Saucier acted, the court of appeals assumed that application of *Graham* to the specific circumstances confronting Saucier was solely a question of "reasonableness" under the Fourth Amendment. *Id.* The Court, however, has repeatedly admonished that the Fourth Amendment's generic reasonableness standard does not adequately define qualified immunity's "objective legal reasonableness" test. *See Wilson*, 526 U.S., at 614-15; *Anderson*, 483 U.S., at 639-40. Instead, the "*contours* of the right must be sufficiently clear that a reasonable official would understand that what *he is doing* violates that right." *Anderson*, 483 U.S.,

Unlike qualified immunity, which inquires into the status of the law "at the time an action occurred," *Harlow*, 457 U.S., at 818, *Graham*'s excessive force test does not include clearly established law as a factor in its "totality of the circumstances" analysis. This unique aspect of qualified immunity is crucial, because officers are not legal scholars and "cannot [be] 'expected to predict the future course of constitutional law'" with respect to Fourth Amendment rules that have not been clearly established by this Court, the governing federal circuit in an officer's jurisdiction, or a consensus of cases of persuasive authority. *Wilson*, 526 U.S., at 617-18.

Although *Graham*'s multi-factor excessive force standard permits a substantial degree of latitude and discretion, it does not afford the same protections as qualified immunity. There is no comparable allowance for reasonably mistaken beliefs about the constitutionality of an officer's conduct. Although *Graham* analyzes the reasonableness of force from the perspective of "a reasonable officer on the scene, rather than with the 20/20 vision of hindsight," the focus remains on the "amount of force that *is* necessary in a particular situation."

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at 640 (emphasis added); *see also Wilson*, 526 U.S., at 615 ("In this case, the appropriate question is the objective inquiry of whether a reasonable officer could have believed that *bringing members of the media into a home during the execution of a warrant* was lawful, in light of clearly established law and all the information the officers possessed.") (emphasis added). By limiting qualified immunity to only those cases where the overarching constitutional standard is not clearly defined, the Ninth Circuit's approach precludes application of the defense to any excessive force claim, since *Graham*'s reasonableness test has been clearly established since 1989.

490 U.S., at 396-97 (emphasis added). Qualified immunity, by contrast, focuses on the amount of force that reasonably, albeit mistakenly, *could have been perceived* as constitutionally permissible in light of a particular situation *and* the law as clearly established at the time.

It is logical that an analytical gap should exist between qualified immunity and excessive force, because the two standards serve different purposes. *Graham* defines the circumstances under which liability for a excessive force constitutional violation will arise. Qualified immunity, by contrast, defines the circumstances under which liability for a constitutional violation will be *excused*—namely, circumstances where the law is not clearly established at the time, or where an officer reasonably, albeit mistakenly, could believe his conduct did not violate constitutional rights of which a reasonable officer would have known.

Of course, in many instances an unreasonable use of force will also constitute objectively unreasonable conduct for purposes of qualified immunity. That is, as a practical matter, the inquiries may yield the same result. But that possibility does not justify a *per se* preclusion of the defense in all excessive force cases. Any attempt to carve out a categorical exception would be inconsistent with qualified immunity, which is premised on a fluid notion of objective legal reasonableness requiring consideration of the specific circumstances with which each officer is confronted and a flexible analysis of the officer's response under both those context-specific circumstances and clearly established law. *See, e.g.*, *Wilson*, 526 U.S., at 614-15; *Anderson*, 483 U.S., at 641. There is no principled reason to exclude peace officers alleged to have used excessive force from the immunity

protections afforded officers in all other constitutional contexts

II. Equating the Inquiries for Qualified Immunity and Excessive Force Could Cause Officers to Forfeit Their Right to an Interlocutory Appeal and Routinely Subject Them to Full-Blown Discovery and Trials.

Qualified immunity is "*an immunity from suit* rather than a mere defense to liability." *Mitchell*, 472 U.S., at 526. Because qualified immunity is designed to protect public officials from the burdens and disruptions of discovery and trial, "a district court's rejection of a defendant's qualified-immunity defense is a 'final decision' subject to immediate appeal under the general appellate jurisdiction statute." *Behrens v. Pelletier*, 516 U.S. 299, 301 (1996).

On appeal, reviewing courts are limited to resolving disputes over an "'abstract issu[e] of law' relating to qualified immunity." *Id.*, at 313. Thus, appellate courts may decide, *de novo*, "whether the federal right allegedly infringed was 'clearly established.'" *Id.* Similarly, appellate courts may determine whether "all the conduct which the District Court deemed sufficiently supported for purposes of summary judgment met the *Harlow* standard of 'objective legal reasonableness.'" *Id.* Mere fact disputes over "whether the evidence could support a finding that particular conduct occurred," however, fall beyond the jurisdictional ambit of an interlocutory appeal. *Id.*

If the Court holds that the qualified immunity and excessive force inquiries are coextensive, officers could forfeit their opportunity to interlocutorily challenge a district court's

erroneous legal conclusion about qualified immunity. A denial of qualified immunity arguably would no longer constitute a "final decision" subject to immediate appeal because it would not be a collateral order distinct from the merits. *See id.*, at 305 (observing that interlocutory appeals are reserved for "a 'small class' of district court decisions that, though short of final judgment, are immediately appealable because they 'finally determine claims of right separable from, and collateral to, rights asserted in the action'") (quoting *Cohen v. Beneficial Ind. Loan Corp.*, 337 U.S. 541, 546 (1949)). If the inquiries into excessive force and qualified immunity are to become coextensive, trial on the merits would have to proceed in every case. *See id.* (noting that courts of appeal lack appellate jurisdiction over "decisions that are subject to revision, and even of 'fully consummated decisions [that] are but steps towards final judgment in which they will merge'") (quoting *Cohen*, 337 U.S., at 546). No redress for a legal misstep by the district court would be available until after an officer withstood full-blown discovery and the "unwarranted demands customarily imposed upon those defending a long drawn-out lawsuit." *Siegert v. Gilley*, 500 U.S. 226, 232 (1991). The policy-driven compromise inherent in qualified immunity would be lost.[5]

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5. If qualified immunity is unavailable in the context of excessive force claims, district courts will be stripped of opportunities to expediently weed out insubstantial civil rights claims at an early stage of the proceedings (for example, by granting a motion to dismiss on the basis of qualified immunity, pursuant to Federal Rule of Civil Procedure 12(b)(6), or by ordering a reply to an answer asserting a qualified immunity defense, pursuant to Federal Rule of Civil Procedure 7(a)). *See Crawford-El v. Britton*, 523 U.S. 574, 598 (1998). *Behrens* made clear

There is no meaningful reason to eliminate the procedural protections that flow from qualified immunity whenever an officer is sued for excessive force as opposed to other unreasonable conduct in violation of the Fourth Amendment. However, such would be the consequence of a holding that qualified immunity is coextensive with the merits inquiry into an excessive force claim.

III. The Court Should Reaffirm the Enduring Importance of the "Reasonable Mistake" in Qualified Immunity Jurisprudence.

It is possible for an officer to violate the Constitution, but to do so under a reasonably mistaken belief that his conduct is lawful. When that happens, the officer is entitled to qualified immunity. This reflects the Court's longstanding recognition that qualified immunity "gives ample room for mistaken judgments" and "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley,* 475 U.S., at 341, 343.

The "reasonable mistake" is one of the core tenets of qualified immunity jurisprudence. In fact, were this Court to prohibit or limit the applicability of qualified immunity and the "reasonable mistake" with respect to excessive force claims, that philosophical departure would have ripple effects beyond the excessive force context. If officers who make

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that a rejection of the qualified immunity defense, even at the pleadings stage, is a "final decision" subject to interlocutory appeal. 516 U.S., at 307. Absent an available qualified immunity defense, however, early procedural protections against unwarranted and disruptive pretrial litigation, including discovery, disappear.

reasonable, albeit mistaken, judgments about the necessity of force can be categorically excluded from the ambit of qualified immunity, other public employees exercising discretionary functions might fear that their immunity protections could be forfeited next. This could dissuade individuals from taking government jobs. Public servants should not have to worry that courts might make policy-based distinctions about which types of duties should be afforded immunity protections, and which should not.

To transform qualified immunity into a guessing game would defeat the purpose of the doctrine. *Harlow*'s objective legal reasonableness test was designed to strike a balance between the need to vindicate civil rights abuses and the need to promote public service and shield government officials from insubstantial civil rights claims. It is inevitable that public servants will err; and when they do, they should be secure in knowing that their errors will not subject them to liability, or suit, provided they err in a manner that is objectively reasonable. *Harlow*'s compromise may be imperfect, but it should be preserved, as it strikes the best "balance between the evils inevitable in an available alternative." *See Harlow*, 457 U.S., at 813.

The notion of "reasonably unreasonable" force is no more paradoxical than the notion of reasonably unreasonable searches and seizures embraced by the Court in *Anderson v. Creighton*. Indeed, in deciding this case, the Court need look no further than *Anderson*: "As we noted before, *Harlow* clearly expressed the understanding that the general principle of qualified immunity it established would be applied '*across the board.*'" 483 U.S. at 645 (emphasis added). Excessive force cases are no exception to the rule. The Court should

reaffirm the vitality of qualified immunity as an available defense to all public servants in all constitutional contexts, including the excessive force context.

CONCLUSION

For these reasons, the Ninth Circuit's judgment should be reversed.

Respectfully submitted,

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Dated: January 8, 2001

FEB 15 2001

No. 99-1977

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BRIEF OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS AMICUS CURIAE IN SUPPORT OF PETITIONER

This brief *amicus curiae* is submitted in support of Respondents Elliot M. Katz and In Defense of Animals. Letters of consent to the filing of this Brief have been lodged with the Court, by Petitioner and Respondents, pursuant to Rule 37.3. [1]

INTEREST OF AMICUS CURIAE

The Association of the Bar of the City of New York is a professional association of approximately 21,000 attorneys. While the majority of its members practice in New York City, the Association has members in nearly every state and in over fifty countries. The Association is chartered to study, address and promote the rule of law and, where appropriate, the reform of the law. The Association, by its Committee on Civil Rights, has been vigilant in insuring that the civil rights and civil liberties of all Americans are fully protected and that effective remedies exist to protect and vindicate such rights. It is particularly concerned that 42 U.S.C. § 1983 and actions under *Bivens* remain as effective weapons against abuse of power. The Committee has published a variety of reports and has held numerous meetings dealing with effective means of limiting the misuse of power by government officials, particularly law enforcement officers.

The Association believes that expanding the

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[1] Pursuant to Rule 37.6, this brief was authored, prepared and paid for in its entirety by the Association of the Bar of the City of New York.

qualified immunity defense to excessive force cases will raise a difficult barrier to full protection of the constitutional rights of all citizens. For these reasons, the Association has submitted this brief.

SUMMARY OF ARGUMENT

To some extent, the qualified immunity defense undercuts the purpose of 42 U.S.C. § 1983 and actions against federal officials brought under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 391-92 (1971), namely to permit a damages remedy against officials who misuse their governmental power. The rationale of recognizing a good faith defense is that government officials should not be held personally liable in damages for actions which, at the time, they did not realize were unlawful. Given the complexity in the legal definition of many constitutional rights, officials should not be personally held liable unless the right they are accused of violating was clearly established by definitive decisions of an appropriate court or by specific legal directives.

However, certain areas of constitutional law are much easier for officials to understand and obey. In particular, many aspects of Fourth Amendment law involve the application of broad community standards, which government officials must adhere to at their peril. While issues involving probable cause may require guidance from the courts, the question of what force is considered excessive is one that does not involve difficult standards of interpretation. Under this Court's decision in *Graham v. O'Connor*, 490 U.S. 386, 396-97 (1989), force applied by an arresting officer is actionable under the Fourth Amendment if the force was objectively unreasonable. "[T]he 'reasonableness' inquiry in an excessive force case is an objective one: the question is

whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them." But this is precisely the same inquiry required under the qualified immunity doctrine. For this reason, the Court below properly found, as did four other Circuits, that the issue on the merits in an excessive force case merges with the qualified immunity doctrine. There is no need for a second question to be asked of the jury or considered by the court, after the fact-finder has determined that the force was objectively unreasonable. This Court should adopt that rule.

ARGUMENT

THE QUALIFIED IMMUNITY DEFENSE MERGES WITH THE MERITS OF THE CASE IN AN EXCESSIVE FORCE SUIT BROUGHT UNDER BIVENS OR IN A SECTION 1983 CASE

A. The Theory of Qualified Immunity

This Court has emphasized the importance of recognizing a damages action against a federal agent misusing his or her authority. In the landmark case of *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 391-92 (1971), Justice Brennan, speaking for the Court, wrote:

> Respondents seek to treat the relationship between a citizen and a federal agent unconstitutionally exercising his authority as no different from the relationship between two private citizens. In so doing, they ignore the fact that power, once granted, does not disappear like a magic gift when it is wrongfully used. An agent acting -- albeit

> unconstitutionally -- in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own. [2]

In *Anderson v. Creighton*, 483 U.S. 635, 638 (1987), this Court emphasized that a suit for damages may be the only practical way to vindicate constitutional guarantees either under 42 U.S.C. § 1983 or under *Bivens*. But it also noted:

> [P]ermitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties. . . .
>
> Our cases have accommodated these conflicting concerns by generally providing government officials performing discretionary functions with a qualified immunity, shielding them from civil damages liability as long as their actions could

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[2] Justice Harlan made the same point in his concurring opinion in *Bivens*: "The injuries inflicted by officials acting under color of law, while no less compensable in damages than those inflicted by private parties, are substantially different in kind," 403 U.S. at 409; as well as in his concurring opinion in *Monroe v. Pape*, 365 U.S. 167, 196 (1961), "deprivation of a constitutional right [by officials misusing their authority] is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right."

> reasonably have been thought consistent with the rights they are alleged to have violated.

This Court has therefore concluded that Federal or state officials should not be held liable in a damages suit for actions taken within the scope of their discretionary duties unless they violated clearly established constitutional rights known to a reasonably informed official. As this Court noted in *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982):

> . . . government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

There is a significant social cost in affording qualified immunity to government officials, both state and federal, [3] as Judge Easterbrook noted recently in *McNair v. Coffey*, 234 F.3d 352, 356 (7th Cir. 2000).

> Let us never forget that immunity in § 1983 cases is a judicial invention. Congress provided for liability in absolute terms. Public officials who violate the Constitution or laws must pay; immunity is anti-textual. The justification for immunity is that the scope of liability has grown like topsy since 1871, when § 1983 was enacted, and that to carry out what Congress must have meant a court may depart from what Congress

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[3] The qualified immunity test is identical for both state and federal officials, see *Wilson v. Layne*, 526 U.S. 603 (1999)

> said. That's a treacherous path for any judge to take, though history may provide a map.

On the other hand, there is certainly a plausible argument that government officials untrained in the law should not be held personally liable simply because they did not know the full range of constitutional law as well as lawyers or judges. The Eleventh Circuit noted in *Lassiter v. Alabama A & M University*, 28 F.3d 1146, 1152, fn.8 (11th Cir. 1994):

> Even if some legal expert would have then concluded that a hearing was required [before Vice-President of University was fired], defendants would still be due qualified immunity if reasonable university officials would not have known about it. *Davis [v. Scherer*, 468 U.S. 183] 196 n. 13, [1984] ("unfair and impracticable" to hold public officials to the same level of knowledge as trained lawyers); *Barts [*v. *Joyner,* 865 F.2d 1187, 1193 (11th Cir.1989),] ("[w]e cannot realistically expect that reasonable police officers know more than reasonable judges about the law").

As a result, courts are often required to make detailed analysis of the scope of a constitutional right, how broadly the right is defined, and when its contours were established. See *e.g. Wilson v. Layne*, 526 U.S. 603 (1999)(law was not clearly established that media could not be asked to "ride along" with police on arrest or search; regulations permitted "media ride-alongs" and no definitive decision prohibited such actions); *Falvo v. Owasso Independent School District*, 220 F.3d 1200 (10th Cir. 2000)(Family Education Rights and Privacy Act right not to have school grades declared in open class not

clearly established; teachers entitled to qualified immunity when they did so); *Trotter v. Regents of University of New Mexico*, 219 F.3d 1179 (10th Cir. 2000)(school officials entitled to qualified immunity in suit by student that he had property or liberty right in continued enrollment at medical school and that he did not receive sufficient process in challenge to academic deficiency decision by school); *Lauro v. Charles*, 219 F.3d 202 (2d Cir. 2000)(officer's staging of "perp walk" whereby arrestee paraded in front of television cameras for no reason violated Fourth Amendment; but right was not clearly established previously; officer entitled to qualified immunity); *Denno v. School Bd. of Volusia County, Fla*, 218 F.3d 1267 (11th Cir. 2000)(law unclear on whether student display of confederate flag was protected by First Amendment; contrary precedents existed; school officials entitled to qualified immunity); *Herring v. Keenan*, 218 F.3d 1171 (10th Cir. 2000)(law unclear on whether probation officer's disclosure of probationers' HIV positive condition was violation of constitutional right to privacy; officer entitled to qualified immunity); *Kalka v. Hawk*, 215 F.3d 90 (D.C. Cir. 2000)(law unclear on whether prison officials must allow humanistic religion to be practiced in prison; entitled to qualified immunity); *Washington Initiative Now v. Rippie*, 213 F.3d 1132 (9th Cir. 2000)(law unclear on right of state official to require disclosure of names and addresses of paid initiative petition collectors; officials entitled to qualified immunity); *Maggio v. Sipple*, 211 F.3d 1346 (11th Cir. 2000)(employee testified at grievance hearing of supervisor and claimed she was retaliated against because of her testimony; but testimony was not on a matter of public concern since the purpose of her testimony was not to inform the public about a deficiency in the office but to support her supervisor at the grievance; in any event, defendants entitled to qualified

immunity since law unclear on public concern nature of speech); *Bilida v. McCleod*, 211 F.3d 166 (1st Cir. 2000)(officers entitled to qualified immunity in seizing raccoon without a warrant from owner who did not have permit; although final entry to seize animal may not have been proper).

B. *The Inapplicability of Qualified Immunity In Excessive Force Cases*

Even though there is a plausible historic and policy reason for recognizing a qualified immunity defense when there is doubt about the scope of a constitutional right, suits for vindication of Fourth Amendment rights involve different considerations. For example, when First Amendment rights are examined, there is a whole range of difficult legal issues concerning what kind of speech is protected by the Constitution, such as what is speech on a matter of public concern, *see Connick v. Myers*, 461 U.S. 138 (1983); how does one show whether speech was a substantial or motivating factor in the decision to take adverse action against an individual, *see Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274 (1977); what government justification will permit sanctioning government employees for their speech, *see Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). These questions often require an awareness of specific holdings of this Court on difficult and thorny legal issues.

1. Suits under the Fourth Amendment

When the Fourth Amendment is involved, the situation is generally different.

a. There is Less Justification for Recognizing Qualified Immunity in Fourth Amendment Cases

First of all, historically, there was no immunity for Fourth Amendment invasions by government authorities. They were sued for trespass, false arrest or false imprisonment and for assault and battery and forced to pay damages if their actions were not justified, without the benefit of any immunity defense. Judge Easterbrook explains:

> Until this century police faced absolute liability (in trespass or battery) for their acts; probable cause and reasonableness were defenses, and immunity (on top of these defenses) was unheard of. A principal function of the fourth amendment was to protect private parties from overreaching by the police by limiting the availability of advance judicial approval (that is, of a warrant) as a defense, to ensure that citizens could recover unless arresting or searching officers could establish the reasonableness of their conduct. See Telford Taylor, *Two Studies in Constitutional Interpretation* 24-47 (1969); Akhil Reed Amar, *The Constitution and Criminal Procedure: First Principles* 3-17, 40-43 (1997). All the great early opinions defining the scope of freedom from official intrusion resolve damages claims, without a hint that if the officers behaved unreasonably they might still be immune from liability. Thus a general doctrine of official immunity, independent of legal uncertainty, is not only anti-textual but also anti-historical in fourth amendment cases.

McNair v. Coffey, 234 F.3d 352, 356 (7th Cir. 2000).

Secondly, the core legal issue in Fourth Amendment cases is generally a broad question of reasonableness, rather than a precise legal definition laid down by this Court, such as what constitutes speech on a matter of pubic concern. Reasonableness, like negligence, involves a community standard, which all citizens are bound to follow, regardless of their knowledge of the precise legal definition laid down by a court. See *Thompson v. Keohane*, 516 U.S. 99, 114 fn. 13 (1995)

> Traditionally, our legal system has entrusted negligence questions to jurors, inviting them to apply community standards. See W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* § 37, pp. 235-237 (5th ed.1984). For that reason, "[t]he question usually is said to be one of fact," although "it should be apparent that the function of the jury in fixing the standard differs from that of the judge only in that it cannot be reduced to anything approaching a definite rule." *Id.*, at 237.

b. Since Probable Cause Determinations Involve a Mixed Question of Law and Fact, There Is Some Justification for Recognizing a Qualified Immunity Defense in Those Situations

It is certainly true that issues of "probable cause" may involve legal definitions and require guidance from the courts: does an anonymous phone call provide probable cause, what level of probability justifies a search or a stop, when do exigent circumstances excuse a warrantless search, what is the permissible scope of a search after probable cause has been found.

For that reason, probable cause determinations under the Fourth Amendment may trigger a qualified immunity defense. See *Anderson v. Creighton*, *supra*, 483 U.S. at 640-41.

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, . . . in the light of pre-existing law the unlawfulness must be apparent. . . . We have recognized that it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and we have indicated that in such cases those officials-- like other officials who act in ways they reasonably believe to be lawful -- should not be held personally liable.

2. The Qualified Immunity Defense Should Not Apply in Excessive Force Cases

But in an excessive force case, the difficult and thorny legal issues of definition do not exist. The standard of excessiveness is one that a jury decides, based on its knowledge of a broad community standard, applying strict instructions that a judge has imposed on them. As this Court acknowledged in *Thompson*: the "function of the jury in fixing the standard differs from that of the judge only in that it cannot be reduced to anything approaching a definite rule."

a. The Definition of Excessive Force

In *Graham v. O'Connor*, 490 U.S. 386, 396-97 (1989), this Court laid out the basic definition of "excessive force."

> With respect to a claim of excessive force, the same standard of reasonableness at the moment applies: "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers," *Johnson v. Glick*, 481 F.2d, at 1033, violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving -- about the amount of force that is necessary in a particular situation.
>
> The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . . . As in other Fourth Amendment contexts, however, the "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. . . . .An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional.

This definition appears in almost all jury instructions given in excessive force cases, as noted below.

b. Under the Definition of Excessive Force, Both Police and Juries Are Given Great Latitude to Consider the Reasonableness of the Officer's Actions

What this definition shows is that police officers are given enormous latitude in deciding the level of force needed to make an arrest. The definition is embodied in jury instructions given in excessive force cases, as noted below. The instructions recognize that police have to make split second decisions about the force necessary in a given situation. Their actions are judged on the basis of the facts in front of them at the time in a fluid situation. The inquiry is an objective one and the officer's actual state of mind is an irrelevancy.

Jury instructions on excessive force already encompass whatever extra level of protection a police officer is entitled to under the "qualified immunity" defense. In a typical jury instruction on excessive force, jurors are asked to take account of the "objective reasonableness" of an officer's action:

> [I]n making a lawful arrest police officers have the right to use such force as is necessary under the circumstances to effect the arrest, and at the same time to protect themselves or others from physical harm. Whether or not the force used in making an arrest was reasonable is an issue to be determined by you, on the basis of that degree of force a reasonable and prudent police officer would have applied in effecting the arrest, under the circumstances in this case.

* * *

The question before you is *whether the actions of the defendant police officer on [date] were objectively reasonable, meaning what a reasonably prudent police officer would have done under similar conditions in light of the facts and circumstances confronting the officer. You are to make this determination without regard to the police officers' underlying subjective intent or motivation.* That means that "evil intentions" will not be considered excessive force if the force used was in fact reasonable. On the other hand, an officer's good intentions will not make the use of excessive force constitutional. *The reasonableness of a particular use of force must be judged from the perspective of a reasonable police officer on the scene, rather than with the 20/20 vision of hindsight. In determining whether the force exercised was reasonable, you should consider the facts and circumstances as you find them to be, including the severity of the offenses at issue, whether the plaintiff posed an immediate threat to the safety of the police officers or others, and whether the plaintiff was actively resisting arrest at the time the alleged excessive force was applied.*

Now the Constitution must not be trivialized. Not every push or shove by a police officer, even if it may later seem unnecessary in the peace and quiet of this courtroom, constitutes excessive force. The concept of reasonableness makes allowance for the fact that police officers are often forced to make difficult split-second judgments in circumstances that are sometimes

> tense, uncertain, dangerous, and rapidly evolving, about the amount of force that is necessary in a particular situation.

See Schwartz and Pratt, *Section 1983 Litigation: Jury Instructions*, § 7.01 at 7-5. (emphasis added)

c. There is No Reason to Apply Qualified Immunity in Excessive Force Cases.

If a jury is given this instruction and finds that an officer engaged in excessive force, it has also made the determination that the officers' actions were not "objectively reasonable," which is the same determination to be made on qualified immunity. That is why the Tenth, Ninth, Seventh, Sixth and D. C. Circuits have all held that the two questions "merge" and a separate qualified immunity defense should not be applied See *McNair v. Coffey*, 234 F.3d 352, 355-56 (7th Cir. 2000):

> *Frazell* [*v. Flanigan*, 102 F.3d 877 (7th Cir.1996)] holds that "once a jury has determined under the Fourth Amendment that the officer's conduct was objectively unreasonable, that conclusion necessarily resolves for immunity purposes whether a reasonable officer could have believed that his conduct was lawful." 102 F.3d at 886-87. This conclusion has the support of at least four other circuits. *Holt v. Artis*, 843 F.2d 242, 246 (6th Cir.1988); Katz v. United States, 194 F.3d 962 (9th Cir.1999), *cert. granted under the name Saucier v. Katz*, --- U.S. ----, 121 S.Ct. 480, --- L.Ed. 2d ---- (2000); *Street v. Parham*, 929 F.2d 537, 540, 541 n. 2 (10th Cir.1991); *Scott v. District of Columbia*, 101 F.3d 748, 759 (D.C.Cir.1996).

In *Street v. Parham*, 929 F.2d 537 (10th Cir. 1991), the Tenth Circuit reversed a jury verdict for a defendant police officer in an excessive force case where the trial court instructed that even if the jury found that the defendants had used excessive force, they still might be entitled to qualified immunity if they did not know that their actions violated federal law. The court held that the qualified immunity charge was error because "[n]o officer could reasonably believe that the use of unreasonable force did not violate clearly established law." 929 F.2d at 540. Thus, "[o]nce the jury concluded that . .. excessive force had been used, the inquiry was over." *Id.* More to the point, the court noted that in the specific context of excessive force claims, "once a factfinder has determined that the force used was unnecessary under the circumstances, any question of objective reasonableness has also been foreclosed." *Id.* at 541 n.2.

In *Holt v. Artis,* 843 F.2d 242, 246 (6th Cir. 1988), the plaintiff brought a § 1983 action against several law officers for use of excessive force. After a jury returned a verdict in favor of the officers, the plaintiff appealed, arguing that three specific jury instructions had been erroneous. Instead, the Sixth Circuit vacated the jury verdict and remanded on the basis of an instruction not raised by either party. Invoking its right to review an issue not assigned as error by any party in the face of "obvious and prejudicial error," the court held that the defendants' affirmative defense of subjective good faith should not have been put to the jury as a question of fact. The court cautioned that if the defendants "subjected [the plaintiff] to more force than was reasonably necessary under the circumstances, then they are liable for his injuries." *Id.* at 246. Put simply, what the officers subjectively believed "is not at issue." *Id.*

In *Scott v. District of Columbia*, 101 F.3d 748, 759 (D.C. Cir. 1996), the D.C. Circuit similarly held that subjective good faith is not a relevant consideration. The *Scott* court held that "the issues of whether an officer used excessive force and whether an officer is entitled to qualified immunity are determined according to a single standard." *Id.* That is, "[f]or both issues, the proper question for the jury is whether the excessiveness of the force is so apparent that no reasonable officer could have believed in the lawfulness of his actions." *Id.* (internal quotations omitted).

The only justification offered by the Solicitor General for imposing a qualified immunity defense in an excessive force case is that qualified immunity should apply across the board to protect government officials from frivolous suits and that the qualified immunity defense was applied in other Fourth Amendment contexts, such as the probable cause determination made in *Anderson*. However, as we show above, there is a significant difference in the legal exploration of probable cause determinations, as opposed to excessive force situations. Probable cause involves a mixed question of fact and law, unlike the situation in an excessive force case, where the objective reasonableness of an officer's actions entails the application of a community judgment.

d. There Are Considerable Procedural Difficulties in Recognizing Qualified Immunity in Excessive Force Situations

There are many practical problems in trying to recognize a qualified immunity defense in an excessive force case. Generally, the question of whether force was excessive involves the weighing of many factual issues, such as did the plaintiff resist, did he have or seem to

have a weapon, what alternatives were available to the officer? Under *Johnson v. Jones*, 515 U.S. 304, 313 (1995), these questions of "evidentiary sufficiency" preclude the grant of summary judgment on qualified immunity grounds.

Second, who decides the question of "qualified immunity" in an excessive force case and when must it be decided? If the issue is not decided before trial for the reasons outlined in *Johnson*, then the question arises whether the jury should determine immunity, as the Fifth Circuit held in *Snyder v. Trepagnier*, 142 F.2d 791 (5th Cir. 1998). But if the jury finds there was excessive force, since the use of force was not objectionably reasonable, how can it also find that the officers are entitled to qualified immunity, because the force was objectionably reasonable, which is the test to be applied on qualified immunity? Are not such findings inconsistent, as this Court suggested when it granted certiorari in *Snyder v. Trepagnier*, 525 U.S. 1098 (1999), *case dismissed*, 526 U.S. 1083 (1999) and asked the parties to brief the following questions:

> 1. Whether a jury finding that a constitutional violation incurred by use of excessive force in an arrest necessarily precludes a finding of qualified immunity, so as to make such dual findings irreconcilable? 2. Whether a reviewing court may reconcile apparent inconsistencies in special jury verdicts despite possible defects in special interrogatories submitted, by determining whether, upon review of the entire record, the verdict as a whole was reasonable and supported by the evidence?

If the qualified immunity issue is decided by a court, after a jury has found that excessive force was used, then a Court is overturning the jury determination of the issue, which it may not do if there is any reasonable basis for the jury findings.

For both constitutional and practical reasons, qualified immunity cannot be applied once a jury has determined the force used by an officer was excessive.

CONCLUSION

For the reasons stated above, *amicus curiae*, the Association of the Bar of the City of New York requests that the decision below be affirmed.

Dated: New York, N.Y.
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FEB 16 2001

No. 99-1977

Supreme Court, U.S.
FILED
FEB 16 2001
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

DONALD SAUCIER,

Petitioner,

—v.—

ELLIOT M. KATZ and IN DEFENSE OF ANIMALS,

Respondents.

ON WRIT OF *CERTIORARI* TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, THE NATIONAL LAWYERS GUILD, THE CENTER FOR CONSTITUTIONAL RIGHTS, AND LAMBDA LEGAL DEFENSE AND EDUCATION FUND, IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with approximately 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU has appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae*. The American Civil Liberties Union of Northern California is one of its regional affiliates.

Throughout its eighty year history, the ACLU and its affiliates have been involved in many cases around the country challenging the use of excessive force by law enforcement officers. The question of whether law enforcement officers found guilty of using excessive force in the performance of their duties are nonetheless entitled to a qualified immunity against damages is therefore a matter of considerable concern to the ACLU and its members.

The National Police Accountability Project of the National Lawyers Guild (NLG) is dedicated to protecting all persons from the unlawful or unconstitutional use of police power. The Project provides information and resources necessary for police misconduct litigation and support for legislative efforts to strengthen remedies for the victims of police abuse.

The Center for Constitutional Rights (CCR) is a progressive law, education, and advocacy organization that is dedicated to the advancement of the rights guaranteed by the

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

United States Constitution and the Universal Declaration of Human Rights. The Center, which grew out of the civil rights movement in the Deep South in the 1960s, has long been in the forefront of social and economic justice litigation.

Excessive force claims are raised in a very large percentage of the police misconduct cases filed by the clients served by NLG and CCR. Recognition of a qualified immunity defense in excessive force cases would significantly impair the ability of these clients to obtain a meaningful remedy when their constitutional rights are violated. With over twenty-five years of active litigation on this issue, CCR and NLG seek this opportunity to make their views available to the Court.

Lambda Legal Defense and Education Fund (Lambda) is a national not-for-profit organization committed to achieving full recognition of the civil rights of lesbians, gay men, and people with HIV/AIDS through impact litigation, education, and public policy work. Founded in 1973, Lambda is the oldest and largest national legal organization dedicated to these concerns. Lambda is participating in this case because our members and clients regularly encounter law enforcement officers in many circumstances, including in the course of engaging in First Amendment expression on issues of concern to lesbians, gay men and people with HIV/AIDS, as the targets of laws criminalizing lesbian and gay sexual conduct, and as the victims of anti-gay bias and hostility harbored by some law enforcement officials. Lambda's members and clients have suffered from the use of excessive force by law enforcement officers in the course of such encounters. Granting officers guilty of using excessive force a qualified immunity defense that is irreconcilable with their Fourth Amendment violation would seriously hinder the ability of Lambda's members and clients to obtain redress. It would also weaken the significant deterrent to the use of

excessive force posed by the potential of a judgment against an officer guilty of objectively unreasonable conduct.

STATEMENT OF THE CASE [2]

On September 24, 1994, the public was invited to attend a special presentation by Vice President Gore at the Presidio Army base in San Francisco to celebrate the anticipated conversion of most of the Presidio to a national park. The conversion of the Presidio was a subject of some public controversy, particularly with respect to the possibility of animal experimentation at the Army's Letterman Hospital.

Respondent, a veterinarian who was then sixty years old, and other members of the organization In Defense of Animals, were among the several hundred members of the public who attended the event. Katz was seated in a public area, separated from the state and dignitary seating area by a waist-high cyclone fence. He was wearing a visible, knee-high leg brace because of a broken foot. He was not wearing a shoe on his injured foot.

On the day of the event, petitioner was working as a military police officer. According to his deposition testimony, he had been told by his superiors that demonstrations would not be allowed and had been instructed to "diffuse the situation if it arises," but not to "draw that much attention if we didn't have to." 194 F.3d at 965. Katz was "pointed out as one of the potential, you know, activists" and petitioner knew "who this person was . . . the person we need[ed] to keep an eye on." *Id.*

As Vice President Gore began speaking, respondent silently removed a cloth banner from his jacket and walked to

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[2] Our statement of the case is based on the description set forth in the Ninth Circuit's opinion below. 194 F.3d 962.

the barrier. The banner measured approximately four feet by three feet and stated "Please Keep Animal Torture Out of Our National Parks." Katz intended to hang the banner over the fence so that Vice President Gore and other speakers could read it.

At this point petitioner and another officer grabbed him from behind and tore the banner away. Katz did not try to prevent them from taking the banner. The two military police officers then each took one of Katz's arms and "started sort of picking [Katz] up and kind of walking [him] out, kind of like very hurriedly, sort of like the bum's rush." *Id.* They took Katz to a military van parked behind the seating area and "violently threw" him inside. Katz was able "to kind of prevent" his head from smashing into the floor of the van and "was able to stop the downward and the forward motion by just catching [himself] so that [he] didn't smash [himself]." With "a great deal of effort," he was barely able "to prevent [himself] from getting seriously hurt." *Id.* at 965-66.

Katz was taken to a military police station. After being briefly detained, he was released and allowed to drive home. Katz was never informed of the basis for his detention or cited with any violation of any law or regulation.

Respondent brought this action against Specialist Saucier and other officials pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), alleging that they violated his Fourth Amendment rights by using constitutionally excessive force to arrest him. Following discovery, petitioner sought summary judgment on the merits and on qualified immunity grounds, arguing that a competent officer could reasonably have believed that the amount of force he used was consistent with the Fourth Amendment. The district court denied the motion, reasoning that the denial of summary judgment on the

merits of the Fourth Amendment claim necessarily foreclosed the possibility of immunity. The district court held that "the qualified immunity inquiry is the same as the inquiry made on the merits," 194 F.3d at 966, and requires the court to consider whether the totality of the circumstances justified the seizure. The court of appeals affirmed. In excessive force cases, the court stated, the Fourth Amendment reasonableness test and the qualified immunity analysis both focus "on the objective reasonableness of the officer's conduct." *Id.* at 968. "Because of this parity," the court concluded, "we have repeatedly held that the inquiry as to whether officers are entitled to qualified immunity for the use of excessive force is the same as the inquiry on the merits of the excessive force claim." *Id.*

SUMMARY OF ARGUMENT

The qualified immunity defense is not applicable to claims of excessive force under the Fourth Amendment. The standard for determining whether excessive force has been used in a particular case is identical to the standard for determining whether an officer is entitled to qualified immunity from liability for a Fourth Amendment violation. To prove a Fourth Amendment violation, the plaintiff must demonstrate that the officer acted in an objectively unreasonable manner and, in determining reasonableness, the fact-finder must make "allowance for the fact that police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain and rapidly evolving." *Graham v. Connor*, 490 U.S. 386, 397 (1989). As the courts have consistently recognized, the Fourth Amendment itself provides the officer with a wide zone of protection. The officer can use a range of force in response to perceived danger and need not use the least force necessary under the circumstances.

Once it is determined that the force that was used was objectively unreasonable, a defense of qualified immunity is logically inconsistent with the Fourth Amendment determination because it is measured by the same "objective reasonableness" standard. A police officer cannot have an objectively reasonable belief that the force used was necessary (thus entitling him to qualified immunity) when it has already been determined that an objectively reasonable officer could not have believed that the force used was necessary (thus establishing a Fourth Amendment violation). Any such findings would be irreconcilable. At the very least, the two inquiries merge into a single analytic question.

Qualified immunity is available in probable cause determinations because of the difficult legal issues that may be presented in any particular decision to arrest or search. No such difficult legal issues are presented in the excessive force context: the sole question for the officer is whether force is necessary to effect an arrest or other police action, or to defend oneself or others from harm. Given the broad protection the officer has under *Graham*, no officer who acts unreasonably for Fourth Amendment purposes could be said to act reasonably in terms of qualified immunity. The existence of such broad protection in the Fourth Amendment itself, moreover, eliminates any fear that officers will be unreasonably chilled from acting in the absence of a separate qualified immunity defense.

Petitioner's suggested standard for determining qualified immunity in the context of an excessive force claim demonstrates the duplicative nature of such an enterprise. According to petitioner, where a court has determined that the force used was objectively unreasonable, it would still have to ask whether this fact would be "obvious" to the officer. But in reaching the conclusion that the force was unreasonable in the first place under the *Graham* standard, the court will have considered this fact and already decided that it would

have been apparent to an objectively reasonable officer that the force was excessive.

ARGUMENT

THE DETERMINATION THAT A POLICE OFFICER'S USE OF FORCE WAS *OBJECTIVELY UNREASONABLE*, AND THEREFORE EXCESSIVE UNDER THE FOURTH AMENDMENT, PRECLUDES A DETERMINATION THAT THE OFFICER ACTED IN AN *OBJECTIVELY REASONABLE* MANNER FOR PURPOSES OF QUALIFIED IMMUNITY

A. Introduction

Government officers and officials are entitled to a defense of qualified immunity where their alleged unconstitutional conduct "does not violate clearly established . . . constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). As this Court has developed and refined the defense, the primary focus is on the "objective reasonableness" of the officer's actions in the light of the legal principles that govern his conduct. *See Anderson v. Creighton*, 483 U.S. 635 (1987). Where an objectively reasonable officer would not know that his conduct was unconstitutional because the legal standard had not been clearly established at the time or because the contours of the constitutional right did not provide sufficient notice that his conduct was violative of the right asserted, the officer is entitled to the qualified immunity defense. *Id. See also United States v. Lanier*, 520 U.S. 259, 270 (1997).

The issue presented by this case is whether this defense should be available in cases where the plaintiff alleges a violation of the Fourth Amendment right to be free from ex-

cessive force during an arrest.[3] For the reasons set forth below, we submit that the defense of qualified immunity is entirely inconsistent with a determination that an officer acted in an objectively unreasonable manner in his use of force. The legal principle that excessive force violates the Fourth Amendment is clearly established, *Graham v. Connor*, 490 U.S. 386, and the standards for determining whether force was excessive and for deciding the qualified immunity issue are identical: was the force used objectively reasonable under the circumstances.

B. The Fourth Amendment Standard

In *Graham v. Connor*, the Court ruled that excessive force claims arising out of arrests, investigatory stops, or other seizures of "free citizens" are properly analyzed under the Fourth Amendment's objective reasonableness standard. The Court stated that reasonableness is to be determined by the "facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* at 396.

Most significantly, the Court defined "reasonableness" in a manner that gives the officers substantial latitude in determining whether and what type of force can be used. As the Court stated:

> The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. *See Terry v. Ohio*, *supra*, 392 U.S. at 20-22.
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[3] This issue was left open in *Graham v. Connor*, 490 U.S. at 399, n.12.

> "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers," *Johnson v. Glick*, 481 F.2d at 1033, violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving -- about the amount of force that is necessary in a particular situation.

Id. at 396-97.

Graham provides officers with a substantial margin of error. Thus, even where post-incident review demonstrates that the force used was unnecessary (for example, the suspect did not have the weapon the officer believed he possessed), there is no Fourth Amendment violation if the officer could have reasonably believed the force used was necessary. Accordingly, once a court or jury has determined that force was excessive, it has of necessity made the judgment -- with "allowance for the fact that police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain and rapidly evolving," *id.* at 397 -- that an objectively reasonable officer could not have thought that the force used was necessary or reasonable under the circumstances.

C. Qualified Immunity Cannot Be A Defense To A Claim Of Excessive Force Under The Fourth Amendment

In the rare situation where the standard for qualified immunity and the constitutional claim are identical, qualified immunity cannot be a separate defense to a claim of a constitutional violation. In the excessive force context, once it

is determined that an objectively reasonable officer would not have used the force in question, it makes no sense -- indeed it is conceptually incoherent -- to assert that the very same objectively reasonable officer could have believed that the force was reasonable. In other words, a police officer cannot have an objectively reasonable belief that his conduct was lawful when the unlawfulness of that conduct rests on a determination that an objectively reasonable officer would not have acted in the same way in the same circumstances.

A significant number of lower federal courts have held that the Fourth Amendment and the qualified immunity doctrine pose precisely the same legal issue and that any differing determinations would be legally irreconcilable. *See, e.g., McNair v. Coffey*, 234 F.3d 352 (7th Cir. 2000); *Frazell v. Flanagan*, 102 F.3d 877, 886-87 (7th Cir. 1966) ("once a jury has determined under the Fourth Amendment that the officer's conduct was objectively unreasonable, that conclusion necessarily resolves for immunity purposes whether a reasonable officer could have believed that his conduct was lawful"); *Scott v. District of Columbia*, 101 F.3d 748 (D.C.Cir. 1996), *cert. denied*, 520 U.S. 1231 (1997); *Alexander v. County of Los Angeles*, 64 F.3d 1315 (9th Cir. 1995); *Roy v. City of Lewiston*, 42 F.3d 691 (1st Cir. 1994); *Street v. Parham*, 929 F.2d 537 (10th Cir. 1991); *Ramirez v. City of Reno*, 925 F.Supp. 681, 687-89 (D.Nev. 1996)("intrinsic analytical incompatibility of an excessive force claim with a qualified immunity claim" given the objective reasonableness test; the "two lines of inquiry converge"); *Landy v. Irizarry*, 884 F.Supp. 788 (S.D.N.Y. 1995).[4]

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[4] Other courts have either decided the excessive force issue on qualified immunity grounds, without first deciding the Fourth Amendment issue, or have collapsed analysis of both issues into a single determination. However, in all of these cases, the courts have applied an objectively reasonable standard on the qualified immunity issue that is identical to

(continued...)

Petitioner, in arguing for a qualified immunity defense in excessive force cases, relies almost exclusively on *Anderson v. Creighton*, 483 U.S. 635. In our view, arguments based on *Anderson* are significantly misplaced. There, this Court ruled that the qualified immunity doctrine is applicable in cases alleging Fourth Amendment violations for warrantless searches or arrests without probable cause or exigent circumstances. The Court reasoned that where an officer is found to have violated the Fourth Amendment by making an arrest or conducting a search without the requisite cause or suspicion, the officer is entitled to the defense of qualified immunity *if* an objectively reasonable officer could have believed that probable cause existed. *Anderson* is premised on the understanding that the "reasonableness" element of probable cause is different from the "objectively reasonable" standard of qualified immunity. That is because the probable cause determination will often require the drawing of

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[4] (...continued)
However, in all of these cases, the courts have applied an objectively reasonable standard on the qualified immunity issue that is identical to the test for excessive force set forth in *Graham*. *See, e.g., Sova v. City of Mt. Pleasant*, 142 F.3d 898 (6th Cir. 1998); *Harrell v. Decatur County*, 41 F.3d 1494 (11th Cir. 1995)(*en banc*); *Brandenburg v. Cureton*, 882 F.2d 211 (6th Cir. 1989); *Scott v. Henrich*, 39 F.3d 912 (9th Cir. 1994), *cert. denied*, 515 U.S. 1159 (1995); *Roy v. City of Lewiston*, 42 F.3d 691. Of course, given this Court's ruling in *County of Sacramento v. Lewis*, 523 U.S. 833, __, 118 S.Ct. 1708, 1714 n.5 (1998), it is now clear that courts must first decide whether a constitutional claim is stated and only if the facts establish a violation should the court proceed to the qualified immunity analysis. In the excessive force context, since the two issues are identical, the second step is plainly redundant. Moreover, as we argue below, application of the qualified immunity defense is unnecessary to protect objectively reasonable conduct. Adopting the contrary view, a number of courts have determined that there is a separate qualified immunity defense in excessive force cases. *See, e.g., Oliveira v. Mayer*, 23 F.3d 642 (2d Cir.1994), *cert. denied*, 513 U.S. 1076 (1995); *Slattery v. Rizzo*, 939 F.2d 213 (4th Cir. 1991).

fine legal lines.[5] Recognizing that reality, this Court held in *Anderson* that given the "difficulty of determining whether particular searches or seizures comport with the Fourth Amendment . . . [l]aw enforcement officers whose judgments in making these difficult determinations are objectively *legally* reasonable . . . [are entitled to qualified immunity]." *Id.* at 644 (emphasis added). Thus, in the probable cause context, a police officer might mistakenly violate a citizen's rights without acting unreasonably.

The probable cause determination for a search or seizure always requires an officer to decide whether the known facts would warrant a reasonable officer to believe that a crime has been committed or that a search would disclose contraband or material of evidentiary value, *Gerstein v. Pugh*, 420 U.S. 103 (1975), and must be made pursuant to evolving legal doctrine under the Fourth Amendment. Consider, for example, this Court's jurisprudence concerning investigatory stops or arrests of persons based on information provided by anonymous informants. In *Alabama v. White*, 496 U.S. 325 (1990), the Court determined that information from an anonymous source would justify an investigatory stop if critical *predictive* details were corroborated by the police. In *Florida v. J.L.*, 529 U.S. 266 (2000), the Court declined to extend *White* to situations where the anonymous source provided information regarding a man with a gun at a certain location, and police investigation led to an observation of a person fitting the general description at that location. In the wake of *J.L.* (and this Court's opinion in *Illinois v. Wardlow*, 528 U.S. 119 (2000)), there will no

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[5] As the Second Circuit stated in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 456 F.2d 1339, 1348 (2d Cir. 1972)(on remand from Supreme Court), "even learned and experienced jurists have had difficulty in defining the rules that govern probable cause . . . . As he tries to find his way in this thicket, the police officer must not be held to act at his peril."

doubt be close cases, depending upon the information received, the observations of the officers and other relevant factors. *See, e.g., United States v. Valentine*, 232 F.3d 350 (3d Cir. 2000)(stop based on anonymous informant who personally provided information to police). And in some of these cases, an officer will make a stop on information that a court will later declare to be insufficient to satisfy the Fourth Amendment; yet, given the lack of a particularized legal standard, the officer may still have acted in an objectively reasonable manner.

No such legal difficulties face the officer who must determine how much force to use in a particular incident, whether in self-defense or in effectuating an arrest. This Court ruled in *Graham* that police officers act consistently with the Fourth Amendment when their conduct is objectively reasonable -- a nontechnical and deferential constitutional doctrine that reflects well established and commonly held judgments on the limits of police force.[6] This standard provides a margin of error, precludes "Monday morning quarterbacking" by a court, permits the officer a wide range of reasonable responses, and does not require the officer to make finely tuned legal determinations. Thus, once it has been determined that an officer has acted in an excessive fashion, it is not possible to claim that an objectively reasonable officer could have thought these actions to be proper.

In many "tense, uncertain and rapidly evolving" situations, reasonable force may comprise a range of options or responses that the officer might employ. Different officers in the identical situation, each behaving reasonably, might elect to use a baton, a chemical agent, a take-down hold, or

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[6] Indeed, the constitutional test is more deferential to the police officer than are the regulations of many major police departments. See Appendix to Brief, Use of Force Directive, Philadelphia Police Department.

a different technique; and each might use greater or lesser force, within a reasonable range, in employing the chosen technique.[7]

Recognition that reasonable force may include a range of responses is consistent with this Court's observation in *Graham* that "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application." 490 U.S. at 396. Understanding that the Fourth Amendment recognizes a range of forcible responses as reasonable also implements this Court's injunction in *Graham* that there be "allowance for the fact that police officers are often forced to make split-second judgments." *Id.* at 396-97.

How wide the allowance or range may be "requires careful attention to the facts and circumstances of each particular case." *Id.* at 396. In some cases, the facts and circumstances may be simple enough that the range of permissible options available to the officer will be quite narrow. In some circumstances no use of force is reasonable if none

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[7] Under *Graham*, police are generally not held to a retrospectively applied "least amount of force" test. Rather, as long as the force used was within a range of objectively reasonable options, the Fourth Amendment is satisfied. *See Forrett v. Richardson*, 112 F.3d 416, 420-21 (9th Cir. 1997), *cert. denied*, 523 U.S. 1049 (1998)(shooting violent felony suspect was reasonable even if his capture through other means was inevitable); *Scott v. Henrich*, 39 F.3d at 915 (reasonable to shoot armed man who confronted police at door); *Menuel v. City of Atlanta*, 25 F.3d 990, 996 (11th Cir. 1994)(fatal shooting of emotionally disturbed suspect was reasonable); *Forrester v. City of San Diego*, 25 F.3d 804, 807-08 (9th Cir. 1994), *cert. denied*, 513 U.S. 1152 (1995)(use of "pain compliance techniques" to remove protestors was reasonable); *Plakas v. Drinski*, 19 F.3d 1143, 1148-49 (7th Cir.), *cert. denied*, 513 U.S. 820 (1994)(shooting of suspect was reasonable; officers not required to use available alternatives of maintaining distance from suspect with protection of barrier, or using chemical spray).

is required. *See Cox v. Treadway*, 75 F.3d 230, 234 (6th Cir.), *cert. denied*, 519 U.S. 821 (1996); *Bauer v. Norris*, 713 F.2d 408 (8th Cir. 1983). In others, the difficulties confronting officers making split-second, life and death decisions may raise sufficient problems that the range of responses that should be deemed reasonable may be quite broad.

The critical point is that this "zone of protection" in use of force cases is provided as part of the Fourth Amendment reasonableness standard itself. And where, as here, the standard for determining qualified immunity is the *same* as that for deciding the constitutional question itself, the defense is superfluous. This is not a matter of semantics or linguistic similarity; rather, it is a case of doctrinal identity. In determining whether an officer's use of force was within a range of reasonable options, the jury is also (and necessarily) answering the question whether a reasonable officer "could have believed" his use of force "to be lawful." *Anderson v. Creighton*, 483 U.S. at 638. Once this question is answered, there is no other inquiry that must be resolved in order to impose liability.[8] The existence of such broad protection in the Fourth Amendment itself, moreover, eliminates any fear that officers will be unreasonably chilled from acting in the absence of a separate qualified immunity defense.

Petitioner correctly states that existing law protects an officer from liability by providing qualified immunity where

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[8] It follows from this analysis that there is no separate qualified immunity inquiry which a trial court must address at the summary judgment stage, on a motion for a verdict as a matter of law, or in connection with post-verdict motions. At such points, it will be appropriate for the court to consider only whether as a matter of law a jury could not find that the defendant's use of force fell outside the range of reasonable options and was constitutionally excessive.

"an appropriately competent officer could *reasonably have believed* that the search or seizure was reasonable within the meaning of the Fourth Amendment, even if such a belief would be erroneous." Pet.Br. at 19-20 (emphasis in original). But by the same token, where the legal standard under the Fourth Amendment sustains use of force where an appropriately competent officer would reasonably believe that the force used was necessary, it is illogical to suggest that where the use of force is excessive that an "appropriately competent officer could reasonably believe" that such excessive force was reasonable.

Put another way, the law ultimately permits only a single right answer to the question of whether probable cause exists in any particular case, but not every wrong answer is therefore unreasonable. By contrast, there is rarely a single appropriate response in cases where the police determine that the use of force is necessary. Instead, there is a range of responses, some of which can be characterized as reasonable. However, once characterized as unreasonable for Fourth Amendment purposes, an officer's use of excessive force cannot later be characterized as reasonable for qualified immunity purposes.[9]

The duplicative nature of petitioner's suggested standard is made clear by his articulation of what a court would be required to do in applying a qualified immunity defense in use of force cases. According to petitioner, the determina-

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[9] Petitioner asserts that like the standard for probable cause, the concept of objective reasonableness for use of force does not establish "with clarity" whether the use of force will be considered lawful. But this is the wrong question and therefore the wrong answer. Where, as here, the constitutional standard articulated in this Court's decisions is defined so as to provide officers with a margin of error that will protect against liability except where an officer would not have reasonably thought the conduct to be legal, the "clarity" required by the qualified immunity doctrine is present.

tion on the merits of the Fourth Amendment question that an officer's use of force was not objectively reasonable is not conclusive; rather, the court must then decide whether it was "sufficiently obvious" that the force used was objectively unreasonable. Pet.Br. at 27. Petitioner's submission is flawed. This Court has used the term "obvious" in relationship to the qualified immunity defense only in a particular context, and even there the ruling did not carry the implications advanced by petitioner. In *Malley v. Briggs*, 475 U.S. 335 (1986), the officer properly submitted his probable cause allegations to a judge. The Court's desire to encourage police officers to seek prior judicial approval was reflected in its approach to the qualified immunity question. Thus, under the particular facts of *Malley*, the Court held:

> Defendants will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue; but if officers of reasonable competence could disagree on this issue, immunity should be recognized.

Id. at 341.

Amici are unaware of any case, other than *Malley*, in which the Court has characterized the qualified immunity question in terms of the obviousness of the constitutional violation. The language of *Anderson v. Creighton*, on which petitioner so heavily relies, is far more typical. There, the Court stated that there would be no immunity if the violation of law would be "apparent" to a reasonable officer in light of clearly established law. Still, the terminology is less important than this Court's repeated acknowledgement that immunity is inappropriate where a reasonably competent officer would have known his actions to be in violation of the Fourth Amendment. As discussed above, this formulation is the same as that set forth in *Graham*,

where the Court made it clear that the Fourth Amendment was violated whenever a reasonably competent officer would know that the use of force was excessive. Once this determination is made, a rule permitting reconsideration of the very same factor under the guise of qualified immunity would invite pure double-counting, would incorporate subjective factors into the qualified immunity analysis, and would effectively elevate the plaintiff's burden of proof in an excessive force case above the preponderance standard. *See McNair v. Coffey*, 234 F.3d at 355 (the argument for immunity in factually (as opposed to legally) close cases "is fundamentally a request to increase the plaintiff's burden of proof"); *see also Tatro v. Klein*, 41 F.3d 9, 14-15 (1st Cir. 1994).[10]

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[10] Petitioner argues that qualified immunity is necessary since even judges disagree as to whether particular uses of force are in violation of the Fourth Amendment. Pet.Br. at 24. It is, of course, a characteristic of our appellate system that courts will divide on some issues. But once the majority has ruled, that decision is the conclusive determination of the merits of the case. In the context of use of force, a unanimous or majority appellate determination that the force used was excessive is a conclusive determination that no reasonable officer could have believed otherwise. Thus, it is erroneous to suggest that a divided court is proof of the proposition that a reasonable officer could have thought the force to be reasonable. Indeed, if this assertion were correct, where this Court rejects a qualified immunity defense by a divided Court, the officer could still claim this immunity on the theory that at least one Justice thought her actions to be objectively reasonable.

Nor can petitioner draw any support from *Wilson v. Layne*, 526 U.S. 603 (1999), or *Williams v. Taylor*, 529 U.S. 362 (2000). In *Wilson*, the Court granted qualified immunity to police who permitted the media to accompany them on a search of a house since the Court had never before decided the constitutionality of that practice. This was a prototypical qualified immunity case, turning on the unsettled nature of the legal claim. *Williams v. Taylor* concerned the scope of a federal court's habeas corpus review of the legal determination made by a state court. This Court ruled that not every "incorrect" application of federal law by a

(continued...)

The doctrinal differences between probable cause and excessive force cases have been recognized by numerous federal courts. *See, e.g.*, *McNair v. Coffey*, 234 F.3d 352; *Humphrey v. Staszak*, 148 F.3d 719 (7th Cir. 1998); *Alexander v. County of Los Angeles*, 64 F.3d 1315; *Guffey v. Wyatt*, 18 F.3d 869 (10th Cir. 1994); *Street v. Parham*, 929 F.2d at 541 n.2 (because of the difficulty of deciding the probable cause issue, the conduct of the officer may be objectively reasonable even if cause did not exist, but in "excessive force cases, once a factfinder has determined that the force used was unnecessary . . . any question of objective reasonableness [is] . . . foreclosed"); *Landy v. Irizarry*, 884 F.Supp. 788; *Foote v. Spiegel*, 995 F.Supp. 1347, 1353 (D. Utah 1998).

In *Finnegan v. Fountain*, 915 F.2d 817, 824 n.11 (2d Cir. 1990), the court made the following pertinent analysis:

> In *Warren v. Dwyer*, 906 F.2d 70, 76 (2d Cir. 1990), we made such a distinction between the reasonableness inquiries underlying a Fourth Amendment claim for an arrest without proba-

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[10] (...continued)
state court would be an "unreasonable" application of federal law as defined by the habeas statute, 28 U.S.C. §2254(d)(1), in the context of a federal court's review of a state court's *legal determination of federal constitutional claims*. It is obvious that certain constitutional issues will not be settled until this Court has spoken. In such circumstances, the Court held, a lower court ruling may be "incorrect" but not "unreasonable" as that term is used in the habeas statute. If there is any analogy to qualified immunity, it would be to the test announced in *Harlow v. Fitzgerald*, 457 U.S. 800, where the Court was concerned with protecting government officials from liability where the plaintiff's legal theory had not yet been clearly established. This is a far cry from use of force claims, the standard for which is clearly established, and where once a court determines that the force used was excessive ("incorrect" in habeas terms), it is also by definition "unreasonable."

> ble cause and qualified immunity. We stated that the probable cause inquiry involved essentially an *ex post* inquiry, judging reasonableness from the "actual circumstances . . . found as a matter of fact," while the qualified immunity involved an *ex ante* inquiry, judging reasonableness "from any reasonable point of view, including even a factual misperception, the officer may reasonably have harbored at the time the events took place." *Id.* at 75. It is questionable whether this same distinction holds up in the context of an excessive-force claim case, because the Supreme Court has made clear that the excessive-force inquiry is not made from an *ex post* perspective, but from the *ex ante* "perspective of a reasonable officer on the scene."

Likewise, in *McNair v. Coffey*, 234 F.3d 352, Judge Easterbrook rejected the argument that qualified immunity was available in a traditional use of force case. The Seventh Circuit restated its earlier determination that "once a jury has determined under the Fourth Amendment that the officer's conduct was objectively unreasonable, that conclusion necessarily resolves for immunity purposes whether a reasonable officer could have believed that his conduct was lawful." *Id.* at 355 (quoting *Frazell v. Flanagan*, 102 F.3d at 886-87). But beyond this essential point, the court also pointed out that application of qualified immunity in this context would extend the doctrine well beyond historical or policy-based rationales. 234 F.3d at 355-56. Further, the court recognized that having the immunity doctrine turn on the issue of whether a reasonable officer would have "realized" that his conduct violated established legal standards (or as petitioner urges, whether it would be "obvious" to a reasonable officer that the objectively unreasonable conduct

constituted excessive force) would in effect re-incorporate the element of subjectivity that both *Graham* and *Harlow v. Fitzgerald* reject. 234 F.3d at 355.

Petitioner asserts that *McNair* is wrongly decided and that its "characterization of *Anderson* is exactly backwards . . ." Pet.Br. at 36. We think that petitioner has not fairly read *McNair*. The court's rejection of qualified immunity in excessive force cases was based upon the fact that the legal standard for excessive force is now well settled *and* on the particularized manner in which *Graham* incorporated the standard of objective reasonableness into the Fourth Amendment test. 234 F.3d at 354. Petitioner's repeated assertion that he is entitled to qualified immunity unless the fact of his "objectively unreasonable" use of force would have been "obvious to him," Pet.Br. at 37, not only advances a defense built upon the subjective beliefs of petitioner but, as discussed above, would permit the kind of double-counting that is antithetical to any principled regime of qualified immunity.

In light of the argument we have made thus far, petitioner's claim that the rejection of a qualified immunity defense would "undermine[] the ability of courts to dispose of suits before trial . . .," Pet.Br. at 39, is surely erroneous. Properly applied, the Fourth Amendment standard governing use of force cases will provide the defendant with the same protection as qualified immunity. If the force used was objectively reasonable based on undisputed facts, the case will and should be dismissed pre-trial.

This Court has stressed that judicially created immunities should extend no further than is necessary to serve the policy that the immunity is intended to effectuate. *See, e.g., Owen v. City of Independence*, 445 U.S. 622 (1980). And, as Judge Easterbrook recently stated in *McNair*:

> Let us never forget that immunity in §1983

> cases is a judicial invention. Congress provided for liability in absolute terms. Public officials who violate the Constitution or laws must pay.
>
> . . .
>
> The Supreme Court has justified immunity doctrines as approximating of the scope of public-official liability that prevailed when §1983 was enacted. *See Richardson v. McKnight*, 521 U.S. 399, 402-07, 117 S.Ct. 2100, 138 L.Ed.2d 540 (1997); *Wyatt v. Cole*, 504 U.S. 158, 164, 112 S.Ct. 1827, 118 L.Ed. 2d 504 (1992). Fair enough in many parts of the law, but not when dealing with the fourth amendment. Until this century police faced absolute liability (in trespass or battery) for their acts; probable cause and reasonableness were defenses, and immunity (on top of these defenses) was unheard of.
>
> . . .
>
> All the great early opinions defining the scope of freedom from official intrusion resolve damages claims, without a hint that if the officers behaved unreasonably they might still be immune from liability. Thus a general doctrine of official immunity, independent of legal uncertainty, is not only anti-textual but also anti-historical in fourth amendment cases.

234 F.3d at 356.

Allowing a qualified immunity defense in this type of case will serve no legitimate purpose and can only serve to eviscerate the protections of the Fourth Amendment's proscription against excessive force.

CONCLUSION

The defense of qualified immunity is irreconcilable with a determination that an officer has violated the Fourth Amendment by use of excessive force. The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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Dated: February 16, 2001

APPENDIX

PHILADELPHIA POLICE DEPARTMENT
DIRECTIVE 22

(12-11-2000)

SUBJECT: USE OF FORCE

I. PURPOSE

A. This directive outlines the proper use of force, particularly in situations involving the use of the baton, Oleoresin Capsicum (OC) Pepper Spray, Taser guns, and other force which may be used by police as well as the required reporting of incidents in which officers are called upon to use less than deadly force. The use of deadly force is fully covered in Directive 10.

II. POLICY

A. The primary duty of all police officers is to preserve human life. Only the minimal amount of force necessary to protect life or to effect an arrest should be used by an officer. **Excessive force will not be tolerated.** Officers should exercise all safe and reasonable means of control and containment, using only the amount of force necessary to overcome resistance. The application of force by a police officer should be guided by principles found in the "Force Continuum" which are:

* Mere presence of police officer(s)
* Verbal persuasion/warnings
* Hands-on techniques/control holds
* Non-lethal force
* Deadly force

B. Additionally, personnel will not unnecessarily or unreasonably endanger themselves and others in applying these guidelines to actual situations.

C. Though many officers may be at the scene of a police incident where force is being used, some officers may not be directly involved in taking police action. As officers, we have an obligation to protect the public and other officers.

DIRECTIVE 22-1

D. As outlined in Section VII, Use of Force Notification Procedure, IAB must be informed when:

1. A person is treated at a hospital (whether or not admitted) or dies while in police custody as the result of actions taken by police.

2. Any time a person in police custody is treated at a hospital (e.g., prisoner complaining of chest pains or a prisoner assaulted by another prisoner).

3. Any incident involving the use of force where an injury or a complaint of an injury results.

4. Whenever a baton has been used to strike a subject, OC Spray has been used by police, or the Taser has been used.

E. The Department's Use of Force form described within will not be used when officers discharge their firearm. It will be completed, however, when the baton has been used to strike an individual, OC Spray was used on an individual, another object was used to strike (e.g., police vehicle), a canine dog has bitten or been used to physically apprehend an individual, or a Taser has been used.

III. UTILIZING FORCE (GENERAL)

A. When responding to any incident which may require the use of force, officers

WILL:

1. Evaluate the situation.
2. Immediately establish control of your firearm.
3. When feasible and safe, provide some warning to the individual.
4. Illuminate the subject, when possible.
5. If force is necessary, coordinate appropriate tactics with a sufficient number of personnel to safely overcome any resistance.
6. Use the minimum force necessary.
7. Handcuff the individual behind the back, palms out, and ensure handcuffs are double-locked and do so at the earliest possible time to reduce potential resistance.
8. Notify a supervisor immediately.
9. Ensure that the individual is checked for injuries.

DIRECTIVE 22-2

10. Take an injured individual or one complaining of an injury to the nearest hospital or appropriate trauma center immediately. (Prepare a Complaint or Incident Report (75-48) for the hospital case and have the individual sign the 75-48 if treatment is refused. Also, note if the individual refuses to sign.) In all cases where the Taser or OC Pepper Spray is used, the individual will be taken to the hospital.
11. Prepare all necessary paperwork as required by department policy.

12. Ensure that the investigator assigned is made aware that force had to be used to control or take the individual into custody.

    NOTE: A description of the actions of the individual which caused to use of force as well as the officer's actions should be included by the assigned investigator within the Investigation Report (75-49). Should injuries occur, they should also be described within the Investigation Report to include treatment received.

B. When responding to any incident which may require the use of force, officers

WILL NOT:

1. Whenever possible, sit, kneel, or stand on a subject's back or chest.

2. Transport an individual in a face down position, especially when handcuffed. This will serve to prevent positional asphyxia that occurs when the position of the subject's body interfered with his/her ability to breathe. If an individual is having trouble breathing or is demonstrating life-threatening symptoms, medical assistance will be sought immediately.

. . . . .

PHILADELPHIA POLICE DEPARTMENT

MEMORANDUM (98-4) JUNE 19, 1998

SUBJECT: USE OF FORCE

I. POLICY

The Philadelphia Police Department recognizes the value of **all** human life and is committed to respecting the dignity of every individual. The primary duty of **all** police officers is to preserve human life.

The most serious act in which a police officer can engage is the use of deadly force. The power to carry and use firearms in the course of public service is an awesome responsibility. Only the minimal amount of force necessary to protect human life should be used by all officers.

A. All sworn officers of the Police Department are responsible and accountable for the proper use of force under appropriate circumstances. Officers are reminded that the application of force **must** be consistent with existing law and with the Philadelphia Police Department Mission and Ethical Principles by which we pledge to value human life and respect the dignity of each individual.

1. Deadly physical force will be used **ONLY** as a last resort and then only to protect life, consistent with Department policy and the law.

2. Only that amount of force necessary to overcome resistance will be used to effect an arrest or take a mentally deranged or emotionally disturbed person into custody.

B. At the scene of a police incident, many officers may be present and some officers may not be di-

rectly involved in taking police actions. However, this does not relieve any officer present of the obligation to ensure that the requirements of the law and Department regulations are complied with.

C. All officers are required to establish and maintain control if the use of force against a subject is wrongful, improperly applied or clearly becomes excessive. Depending upon the circumstances, both federal and state law provide for criminal sanctions, and civil liability against police officers. Departmental sanctions may also result when officers fail to take appropriate actions.

NOTE: EXCESSIVE FORCE WILL NOT BE TOLERATED.

II. PROCEDURES

A. All officers of the Philadelphia Police Department at the scene of a police incident must:

1. Immediately establish firearms control. No officer will discharge a firearm unless such force is necessary to prevent imminent death or serious bodily injury to themselves or to another person and there is no other alternative and such discharge is consistent with the policy herein established.

2. Use minimum necessary force.

3. Employ non-lethal alternatives, as appropriate.

4. Where feasible, and consistent with personal safety, some warning, such as "POLICE," "DON'T MOVE," should be given. Above all, the safety of the public and the officers must

be the overriding concern whenever the use of firearms is considered.

B. Whenever it becomes necessary to take a violent or resisting subject into custody, responding officers should utilize appropriate tactics in a coordinated effort to overcome resistance. The patrol supervisor, if present, should direct and control all activity. Whenever possible, officers should make every effort to avoid tactics, such as sitting kneeling or standing on a subject's chest or back, which may result in chest compression, thereby reducing the subject's ability to breathe.

C. When, pursuant to existing Department guidelines, it becomes necessary to handcuff an individual, the subject shall be cuffed behind their back, palms out, at the earliest opportunity to reduce the potential for resistance which may cause injuries. In addition,alternative restraining devices shall be used, at the earliest opportunity, to restrain or further restrain a subject whose actions or behavior may cause injury to himself or others.

D. After an individual has been controlled and placed under custodial restraint using handcuffs and other authorized methods, the person should be positioned so as to promote free breathing. The subject should not be maintained or transported in a face down position. The officer assuming custody of the subject should closely observe him or her for any apparent injuries.

1. If the area is dark, a flashlight or other source of illumination should be used to maintain a clear view of the subject at all times.

E. If a person appears to be having difficulty breathing or is otherwise demonstrating life-threatening symptoms, medical assistance will be sought **immediately**. The patrol supervisor will direct that alternate means to maintain custody be utilized, if appropriate. The unauthorized use of restraints and the transportation of subjects in a face down position within any vehicle are **prohibited**.

III. USE OF FIREARMS "PROHIBITED CONDUCT"

A. Police officers *shall not* use deadly physical force against another person unless they have probable cause to believe they must protect themselves or another person from imminent death or serious bodily injury.

B. Police officers *shall not* discharge their weapons when doing so will unnecessarily endanger innocent persons.

C. Police officers *shall not* discharge their firearms in defense of property.

D. Police officers *shall not* discharge their firearms to subdue a fleeing individual who presents no threat of imminent death or serious bodily injury to themselves or another person present.

E. Police officers *shall not* fire warning shots.

F. Police officers *shall not* discharge their firearms to summon assistance except in emergency situations when personal safety is endangered and no other reasonable means is available.

G. Police officers *shall not* discharge their firearms at or from a moving vehicle unless deadly physical force is being used against the police officer or

another person present, by means **other than** the moving vehicle.

H. Police officers *shall not* discharge their firearms at a dog or other animal except to protect them selves or another person from physical injury and there is no other **reasonable** means to eliminate the threat, or when acting consistently with existing Department guidelines authorizing the humane destruction of injured animals.

I. Police offices *shall not* under any circumstances cock a firearm. Firearms must be fired double action at all times.

JOHN F. TIMONEY
Commissioner